SUPREME COURT OF THE UNITED STATES.

No. ~~214.~~ 99.

GUSTAVUS KUTTER, PLAINTIFF IN ERROR,

vs.

SOLOMON A. SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, before the Hon. Thomas Drummond, judge of the district court for the district aforesaid, and on Tuesday, the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh year.

WM. H. BRADLEY, *Cl'k.*

GUSTAVUS KUTTER
v.
SOLOMON A. SMITH. } Trespass on the case.

Be it remembered, that on the fifth day of August, in the year of our Lord one thousand eight hundred and sixty-two, said plaintiff, by Smith, Hart & Clyde, his attorneys, came into the clerk's office of the circuit court of the United States for the northern dis-
2 trict of Illinois, and filed his precipe for summons and bond for costs in the words and figures following, to wit:

Precipe for summons.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, 1862.

GUSTAVUS KUTTER
v.
SOLOMON A. SMITH. } Trespass on the case. Damages $10,000.

You will please issue a summons in the above entitled cause in favor of the above named plaintiff, who is a citizen of the State of New York, against the above named defendant, who is a citizen of the State of Illinois, and make the same returnable to said court on the 1st Monday of October, A. D. 1862.

Dated the 4th day Aug., A. D. 1862.

Yours, &c.,

SMITH, HART & CLYDE,
Pl'ff's Att'ys.

To WM. H. BRADLEY, Esq., the clerk of said court.

Endorsed: Filed Aug. 5th, 1862. Wm. H. Bradley, *Cl'k.*

[REC. CCXIV, D. T., 1863.]—1

3 *Bond for costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1862.

GUSTAVUS KUTTER
v.
SOLOMON A. SMITH.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 4th day of August, A. D. 1862.

SMITH, HART & CLYDE.

Endorsed: Filed Aug. 5, A. D. 1862. Wm. H. Bradley, *Clerk.*

And thereupon a summons issued against said defendant in
4 the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Solomon A. Smith, if he shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Gustavus Kutter in a plea of trespass on the case, to his damage, as he alleges, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Roger B. Taney, Chief Justice of the
[SEAL.] Supreme Court of the United States of America, at Chicago aforesaid, this 5th day of August, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the 87th year.

WM. H. BRADLEY, *Cl'k.*

5 *Marshal's return.*

The within named Solomon A. Smith has this 4th day of August, A. D. 1862, accepted service of this writ and waived the reading thereof to him.

J. R. JONES,
U. S. Marshal of Nor. Dist. of Illinois.
By GEO. L. WEBB, *Deputy.*

Endorsed: Filed Aug't 18, 1862. Wm. H. Bradley, *Cl'k.*

And afterwards, to wit, on the 4th day of October, A. D. 1862, said plaintiff, by his said attorneys, came and filed his declaration in the words and figures following, to wit:

Declaration.

United States cir. court, seventh cir. and nor. dist. of Ills., Oct. term, 1862.

Gustavus Kutter, plaintiff in this suit, who is a citizen of the State of New York, by Smith, Hart & Clyde, his attorneys,
6 complains of Solomon A. Smith, defendant herein, who is a citizen of the State of Illinois, and *who is a citizen of the State of Illinois, and* who has been summoned, &c., of a plea of trespass on the case.

1st. For that whereas, heretofore, to wit, on the first day of May, A. D. 1857, one John Link did demise and lease to one Oren Sherman, by an instrument in writing, under the hands and seals of said Link and Sherman, bearing date the day and year last aforesaid—a copy thereof is hereto attached and made a part of this declaration, and now, &c., &c., (and now here shown to the court)—for a certain term of years from said last mentioned date, and for a certain annual rent named in said lease, to be paid by said Sherman therefor, all the following described premises situate in the city of Chicago, county of Cook and State of Illinois, and described as follows, to wit: the east nineteen feet and six inches of the west half *of the west half* of lot number seven, in block number twenty-one, in the original town of Chicago; under and by virtue of which said lease the said
7 Sherman did, on or about the first day of May, A. D. 1857, go into and take possession of said described premises, and did then and there, and with the knowledge and consent of said Link, to wit, in the year last aforesaid, erect and build thereon, at his own costs, a brick store-building of great value, to wit, of the value of ten thousand dollars, and did then and there, and for a long space of time, use and occupy said premises under said lease, and said plaintiff avers that in and by said lease it was agreed upon by and between said parties thereto, that at the expiration of the term mentioned in said lease, that it should be at the election of the said party of the

first part thereto either to purchase the buildings which might be erected on said demised premises by said Sherman, at their appraised value, or to renew the lease of said demised premises for the term of ten years longer, and that the value of the buildings, as well as the value of the rent of said demised premises, were to be appraised by three disinterested persons, one to be chosen by the said party
8 of the first part, one by the said party of the second part, and the two appraisers thus chosen to choose the third person, and the majority were to decide the value of the buildings, as well as the value of the rent of said demised premises.

And said plaintiff further avers, that on the 26th day of January, A. D. 1858, the said Oren Sherman, then being in possession of said demised premises under said lease, and then being the owner of the said store-building so as aforesaid erected thereon by him, did make and execute under his hand and seal, (his wife joining in the same,) a deed of trust to one Ezekiel S. Smith, in and by which said deed of trust the said Oren Sherman and wife did grant, bargain, sell, and convey to said Ezekiel S. Smith, as trustee, all his right, title, interest, and leasehold estate in and to said demised premises, together with the three-story brick store-buildings situated thereon, which said conveyance was in trust to secure to Loeschigk Wessendonck & Co., of the city of New York, the payment of seven thousand six hundred and ninety-two dollars and ninety-five cents, according to
9 the term and effect of three certain promissory notes described in said trust deed.

And said plaintiff further avers, that default was made by said Sherman in the payment of said promissory notes described in said trust deed, and that thereupon said property so conveyed in trust, and all interest of the said Oren Sherman in said premises so as aforesaid leased to him and hereinbefore described, together with the store-building thereon, were sold by the said trustee, Ezekiel S. Smith, on the fifteenth day of July, A. D. 1861, at public sale, in conformity with the provisions of said deed of trust, for the purpose of making the sum of money due and owing from said Sherman to said Loeschigk, Wessendonck & Co., at which said sale the said plaintiff was the highest and best bidder, and the said leasehold estate and said store-building were then and there struck off and sold to said plaintiff by said trustee, and a deed of the same was then and there executed and delivered to said plaintiff by said trustee, and said plaintiff then and there became the owner of said property and all the interest of said Sherman in said store-building, and then and
10 there became and was entitled to the possession of the same for the remainder of the term mentioned in said lease, and being such owner, he, the said plaintiff, became and was entitled to have and receive of and from the said John Link, his executors, administrators or assigns, at the expiration of the term of said lease, the just and true value of the said store-building situate thereon, to be determined by three appraisers as provided in said lease, which said store-building said plaintiff avers to be worth the sum of ten thousand dollars.

And said plaintiff further states, that by an instrument in writing under the hands and seals of said John Link and Solomon A. Smith, bearing date the eleventh day of April, A. D. 1859, the said John Link did assign, transfer, and set over unto said Solomon A. Smith, among other things, the said lot of ground before described, and all right of Link to said property; which said deed of assignment was made for the benefit of certain creditors of John Link therein named.

That said Solomon A. Smith did then and there, to wit, on the day and year last aforesaid, accept the trust and assumed to have and control the property hereinbefore described, and from thence
11 and until the present time has managed and controlled the property and effects so assigned to him, and still manages, controls, and exercises acts of ownership over the property and effects so assigned to him, including the said lot hereinbefore described as leased to said Sherman. And the said plaintiff says, that although he, the said plaintiff, was the owner of said property so conveyed in trust by said Oren Sherman, situate on the lot hereinbefore described, and entitled to the same or the value thereof, to be determined by appraisers as provided in said lease, yet the said defendant, Solomon A. Smith, not regarding the rights of the plaintiff in this behalf, did, on the 24th day of May, A. D. 1862, declare said term under said lease ended, and did then and there give notice to said plaintiff that the term under said lease was ended, and did then and there, to wit, on the day and year last aforesaid, enter into and upon said demised premises and take possession thereof, and did then take possession of the store-building situate thereon, and still continues to hold and occupy said premises and the said store-building against the said plaintiff, and has refused and still refuses to render said building to the plaintiff,
12 although requested so to do by said plaintiff. Said defendant, upon request by said plaintiff to appraise said store-building as provided in said lease, refused so to do; and that said defendant neglects and refuses to appoint an appraiser, as provided in said lease, to fix and determine the value of the building thereon although often requested by said plaintiff so to do, and has refused and still neglects and refuses to pay to said plaintiff the value of the said brick store-building situate on said lot as aforesaid, although often requested so to do, to the damage of said plaintiff in the sum of ten thousand dollars; and therefore said plaintiff brings suit, &c.

SMITH, HART & CLYDE, *Pl'ff's Att'ys.*

Copy of Lease.

This indenture, made the first day of May, in the year of our Lord one thousand eight hundred and fifty-seven, between John Link, of the city of Chicago, county of Cook, and State of Illinois, party
13 of the first part, and Owen Sherman, of the same place, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the

second part, his executors, administrators and assigns, has demised and leased to the said party of the second part all those premises, situate, lying and being in the city of Chicago, in the county of Cook, and in the State of Illinois, known and described as follows, to wit: the east nineteen feet and six inches ($19\frac{6}{12}$) of the west half of the west half of lot number seven (7,) in block number 21 (21,) in the original town of Chicago: to have and to hold the said above described premises, with the appurtenances, unto the said party of the second part, his executors, administrators and assigns, from the first day of May, in the year of our Lord one thousand eight hundred and fifty-seven, for and during and until the first day of May, one thousand eight hundred and sixty-nine.

And the said party of the second part, in consideration of the leasing of the premises aforesaid by the said party of the first part
14 to the said party of the second part, does covenant and agree with the said party of the first part, his heirs, executors, administrators and assigns, to pay to the said party of the first part, as rent for said demised premises, the sum of three hundred dollars per annum for the first two years, and eleven hundred and seventy dollars per annum for the next ten years ensuing, payable quarterly, viz: on the first day of August, November, February and May, during said term; and also, that he will pay or cause to be paid all taxes and assessments that may be laid, charged or assessed on said demised premises pending the existence of his lease; or if at any time after any such taxes or assessments shall have become due or payable, the said party of the second part, or his legal representatives, shall neglect to pay such taxes or assessments, it may be lawful for the said party of the first part to pay the same at any time thereafter, and the amount of any and all such payments so made by said party of the first part shall be deemed and taken and are hereby declared to be as much additional and further rent for the above demised premises due from and payable by the said party of the second part, his executors, administrators or assigns, and may be collected in the same manner, by distress
15 or otherwise, as is hereinafter provided for the collection of other rents to grow due thereon. And the said party of the second part further covenants with the said party of the first part, that said second party has received said demised premises in good order and condition, and at the expiration of the time in this lease mentioned he will yield up the said premises to the said party of the first part in as good condition as when the same were entered upon by the said party of the second part—loss by fire, or inevitable accident, or ordinary wear, excepted—and also will keep said premises in good repair during his lease at his own expense.

And the said party of the second part, his executors, administrators and assigns, agree further to pay (additional to the rents above specified) all water rents levied or charged on said premises, for and during the time for which the lease is granted, and save the said premises, and the said party of the first part, harmless therefrom, and that he will keep said premises in a clean and healthy condition, in accordance with the ordinances of the city and directions of the sew-

erage commissioners. It is expressly understood and agreed
16 by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid as aforesaid, or if default shall be made in any of the covenants herein contained to be kept by the said party of the second part, his executors, administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, at his election, to declare said term ended, and into the said premises, or any part thereof, either with or without process of law, to re-enter, and the said party of the second part, or any other person or persons occupying in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in his first and former estate, and to distrain for any rent that may be due thereon upon any property belonging to the said party of the second part, whether the same be exempt from execution and distress by law or not; and the said party of the second part in that case hereby agrees to waive all legal rights which he may have to hold or retain any such
17 property under any exemption law now in force in this State, or in any other way, meaning and intending hereby to give the said party of the first part, his heirs, executors, administrators or assigns, a valid and first lien upon any and all goods, chattels or other property belonging to the said party of the second part as security for the payment of said rent in manner aforesaid, anything hereinbefore contained to the contrary notwithstanding. And if at any time said term shall be ended at such election of said party of the first part, his heirs, executors, administrators or assigns aforesaid, or in any other way, the said party of the second part, his executors, administrators and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property peaceably to said party of the first part, his heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid; and if he shall remain in possession of the same ten days after notice of such default, or after the termination of this lease in any of the ways above named, he shall be deemed guilty of a forcible detainer of said premises under the statute, and
18 shall be subject to all the conditions and provisions above named, and to eviction and removal forcibly or otherwise, with or without process of law, as above stated.

And it is further agreed upon by and between the parties, that at the expiration of ten years from the first day of May, one thousand eight hundred and fifty-nine, that it shall be at the election of the said first party either to purchase the buildings erected on said leased premises at the appraised value at that time, or renew the lease of the said demised premises for the term of ten years longer, and the value of the buildings, as well as the value of the rent of said demised premises, to be appraised by three disinterested persons—one to be chosen by the party of the first part; one by the party of the second part; and the two appraisers thus chosen are to

choose the third person, and the majority are to decide the value of the buildings as well as the value of the rent of the above mentioned premises, as the case may be; and it is further agreed upon by and between the parties, that at the expiration of each and every ten years from May first, one thousand eight hundred and sixty-nine, for and during the term of ninety-nine years from the date of this indenture, that the party of the first part is either to renew the lease or purchase the buildings above stipulated;
19 and it is further understood and agreed upon, by and between the parties, that the said second party shall have the privilege of extending the east wall of the above mentioned building six (6) inches on the adjoining lot on the east. And if the said party of the first part elects to build on the said adjoining lot, he shall have the privilege of using said wall, by paying the second party the appraised value of (6) inches of said wall, built upon said six (6) inches on said adjoining lot, as stipulated in lease dated June first, one thousand eight hundred and forty-nine, executed by Eliza Garrett, executrix, and James Crow and Thomas G. Crow, executors of the estate of Augustus Garrett, deceased, to A. S. Sherman. And it is further agreed and understood upon, that the said first party is to give notice in writing to the said second party, if he elects to purchase said buildings above mentioned sixty (60) days previous to said purchase.

In witness whereof, the parties have hereunto set their hands and seals, the day and year first above written.

(Signed) JOHN LINK. [SEAL.]
OWEN SHERMAN. [SEAL.]

20 Endorsed: Filed Oct. 4, 1862. Wm. H. Bradley, *Cl'k.*

And afterwards, to wit, on the 20th day of October, A. D. 1862, said defendant, by Scammon, McCagg and Fuller, comes and files a demurrer to said declaration in the words and figures following, to wit:

Demurrer.

In the United States circuit court, northern district of Illinois—October term, 1862.

GUSTAVUS KUTTER
v.
SOLOMON A. SMITH.

And the said defendant, by Scammon, McCagg and Fuller, his attorneys, comes and defends the wrong and injury, &c.; and says that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plantiff to have or maintain his aforesaid action thereof against him, the said defendant, and that he, the said defendant,

21 is not bound by the law to answer the same, and this he is ready to verify; wherefore, for want of a sufficient declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them, &c.

SCAMMON, McCAGG & FULLER,
Dft's Att'ys.

Endorsed : Filed Oct. 20, 1862. Wm. H. Bradley, *Cl'k.*

And afterwards, to wit, on the 22d day of November, A. D. 1862, in the record of the proceedings of said court in said cause is the following entry, to wit :

GUSTAVUS KUTTER
v.
SOLOMON A. SMITH. } Case.

Now comes on to be heard the demurrer of the defendant to the plaintiff's declaration, and after argument of counsel, the court not being sufficiently advised, takes time to consider.

22 And afterwards, to wit, on the 25th day of November, A. D. 1862, the said defendant, by his attorneys, comes and files his plea in the words and figures following, to wit :

Defendant's Plea.

In United States circuit court, N. district of Illinois—Oct. T., 1862.

SOLOMON A. SMITH
ads.
GUSTAVUS KUTTER. } In case.

And now comes the said defendant, and says he is not guilty in manner and form as the plaintiff hath above declared against him, and of this he puts himself on the country, for trial, &c.

By his Atty's.

SCAMMON, McCAGG, & FULLER.

Nov. 25, '62.

And the said plaintiff doth the like, &c.

E. S. SMITH,
Att'y for Pl'ff.

Endorsed : Filed Nov. 25, 1862. Wm. H. Bradley, *Cl'k.*

23 And afterwards, to wit, on the 25th day of November, A. D. 1862, in the record of the proceedings of said court in said cause is the following entry to wit :

GUSTAVUS KUTTER
v.
SOLOMON A. SMITH. } Trespass on the case.

Now came the parties by their attorneys, and thereupon the defendant, by his attorneys, withdraw his demurrer to the plaintiff's declaration, and by leave of the court files his plea; and on issue joined, come a jury of good and lawful men, to wit, D. A. Foot, John Ewing, Samuel H. Gilbert, Theron P. Parker, John S. Rudd, Robert S. Barr, Orville N. Adams, Vincent G. Harbough, John G. Potts, George N. Bently, G. Lyman, and H. C. Blackburn, who are all duly elected, tried and sworn, to well and truly try said issue. After hearing the evidence, the argument of counsel and the instructions of the court, return into court and said: We, the jury, find the defendant not guilty.

It is thereupon considered and adjudged by the court that the defendant go hence, and that he have and recover of and from
24 the said plaintiff the costs and charges herein by him expended in and about his defence, amounting to the sum of thirty-three dollars and seventy-five cents, and that execution issue therefor.

And afterwards, to wit, on the 25th day of November, A. D. 1862, said plaintiff, by his attorneys, came and filed the following bill of exceptions, to wit:

25 UNITED STATES OF AMERICA.

Circuit court of the United States for the eighth circuit and northern district of Illinois—October term, 1862.

GUSTAVUS KUTTER
vs.
SOLOMON A. SMITH. } Action on the case.

Be it remembered, that on the trial of this cause, on the twenty-fifth day of November, eighteen hundred and sixty-two, yet of the October term, the plaintiff, to maintain the issue on his part, offered, and gave in evidence to the jury, a certain instrument, in writing, from John Link to Oren Sherman; which writing is as follows:

This indenture, made this first day of May, in the year of our Lord one thousand eight hundred and fifty-seven, between John Link, of the city of Chicago, county of Cook, and State of Illinois, party of the first part, and Oren Sherman, of the same place, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his executors, administrators, and assigns, has demised and leased
26 to the said party of the second part all those premises, situate, lying, and being in the city of Chicago, in the county of Cook, and in the State of Illinois, known and described as follows, to wit: the east nineteen feet and six inches (19 $\frac{6}{12}$) of the west half of the west half of lot number seven, (7,) in block number twenty-

one, (21,) in the original town of Chicago, to have and to hold the said above-described premises, with the appurtenances, unto the said party of the second part, his executors, administrators, and assigns, from the first day of May, in the year of our Lord one thousand eight hundred and fifty-seven, for and during and until the first day of May, one thousand eight hundred and sixty-nine. And the said party of the second part, in consideration of the leasing of the premises aforesaid, by the party of the first part to the said party of the second part, does covenant and agree with the said party of the first part, his heirs, executors, administrators, and assigns, to pay the said party of the first part, as rent for said demised premises, the sum of three hundred dollars per annum for the first two years, and eleven hundred and seventy dollars per annum for the next ten years ensuing, payable quarterly, viz: on the first day of August, November, February, and May, during said term. And also, that he will

27 pay, or cause to be paid, all taxes and assessments that may be laid, charged, or assessed on said demised premises, pending the existence of this lease; or if, at any time after any such taxes or assessments shall have become due or payable, the said party of the second part, or his legal representatives, shall neglect to pay such taxes or assessments, it may be lawful for the said party of the first part to pay the same at any time thereafter, and the amount of any and all such payments so made by the said party of the first part shall be deemed and taken, and are hereby declared, to be so much additional and further rent for the above-demised premises, due from and payable by the said party of the second part, his executors, administrators, or assigns, and may be collected in the same manner by distress or otherwise, as is hereinafter provided for the collection of other rents to grow due hereon.

And the said party of the second part further covenants with the said party of the first part, that said second party has received said demised premises in good order and condition, and that at the expiration of the time in this lease mentioned he will yield up the said premises to the said party of the first part, in as good condition as when the same were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear, excepted; and also will keep said premises in good repair during this lease, at his own expense.

28 And the said party of the second part, his executors, administrators, and assigns, agree further to pay (additional to the rents above specified) all water rents levied or charged on said premises, for and during the time for which the lease is granted, and save the said premises and the said party of the first part harmless therefrom, and that he will keep said premises in a clean and healthy condition, in accordance with the ordinances of the city and the directions of the sewerage commissioners.

It is expressly understood and agreed by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the cov-

enants herein contained, to be kept by the said party of the second part, his executors, administrators, and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney, or assigns, at his election, to declare said term ended, and into the said premises, or any part thereof, either with or without process of law, to re-enter, and the said party of the second part, or any other person or persons occupying in or upon the same, to expel, remove, and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as in his first and former estate, and to distrain for any rent that may be due thereon upon any
29 property belonging to the said party of the second part, whether the same be exempt from execution and distress by law or not, and the said party of the second part, in that case, hereby agrees to waive all legal rights which he may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way; meaning and intending hereby to give the said party of the first part, his heirs, executors, administrators, or assigns, a valid and first lien upon any and all goods, chattels, or other property belonging to the said party of the second part, as security for the payment of said rent, in manner aforesaid, anything hereinbefore contained to the contrary notwithstanding. And if at any time said term shall be ended at such election of said party of the first part, his heirs, executors, administrators, or assigns, as aforesaid, or in any other way, the said party of the second part, his executors, administrators, and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property peaceably to said party of the first part, his heirs, executors, administrators, and assigns, immediately upon the determination of said term as aforesaid, and if he shall remain in possession of the same ten days after notice of such default, or after the termination of this lease, in any of the ways above named, he shall be deemed guilty of a forcible detainer of said premises, under the statute, and shall be subject to all the conditions and provisions above named, and to eviction and removal forcibly or otherwise, with or without
30 process of law, as above stated.

And it is further agreed upon, by and between the parties, that at the expiration of ten years from the first day of May, one thousand eight hundred and fifty-nine, that it shall be at the election of the said first party either to purchase the buildings erected on said leased premises at the appraised value at that time, or renew the lease of the said demised premises for the term of ten years longer, and the value of the buildings as well as the value of the rent of the said demised premises, to be appraised by three disinterested persons—one to be chosen by the party of the first part, one by the party of the second part—and the two appraisers thus chosen are to choose the third person, and the majority are to decide the value of the buildings, as well as the value of the rent of the above mentioned premises, as the case may be. And it is further agreed upon, by and between the parties, that at the expiration of

each and every ten years from May first, one thousand eight hundred and sixty-nine, for and during the term of ninety-nine years from the date of this indenture, that the party of the first part is either to renew the lease or purchase the buildings as above stipulated.

And it is further understood and agreed upon, by and between the parties, that the said second party shall have the privilege of extending the east wall of the above mentioned buildings six (6) inches on the adjoining lot on the east. And if the said party of
31 the first part elects to build on the said adjoining lot he shall have the privilege of using said wall, by paying the said second party the appraised value of six (6) inches of said wall, built upon said six (6) inches on said adjoining lot, as stipulated in lease, dated June first, one thousand eight hundred and forty-nine, executed by Eliza Garrett, executrix, and James Crow and Thomas G. Crow, executors of the estate of Augustus Garrett, deceased, to A. S. Sherman. And it is further understood and agreed upon, that the said first party is to give notice in writing to the said second party, if he elects to purchase said buildings above mentioned, sixty (60) days previous to said purchase.

In witness whereof, the parties have hereunto set their hands and seals, the day and year first above written.

JOHN LINK. [SEAL.]
OREN SHERMAN. [SEAL.]

The said plaintiff, to further maintain the issue on his part, offered and gave in evidence a certain other instrument in writing commonly called a "trust deed"—Oren Sherman to E. S. Smith—with a certificate of registry thereof in Cook county, which is as follows:

This indenture, made this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and fifty-eight, between Oren Sherman and Hannah, his wife, of the city of
32 Chicago, in the county of Cook and State of Illinois, parties of the first part, and Ezekiel S. Smith, of the city of Chicago, in the county and State aforesaid, of the second part, witnesseth, that the said Owen Sherman is justly indebted unto Loeschigk, Wesendonck & Co., of the city of New York, in the sum of seven thousand six hundred ninety-two and $\frac{95}{100}$ dollars, secured by three promissory notes, dated January 1st, A. D. 1858, one of which is for the sum of twenty-five hundred sixty-five and $\frac{33}{100}$ dollars, payable eleven months from its date; one for the sum of twenty-five hundred sixty-three and $\frac{81}{100}$ dollars, payable fifteen months from its date; and one for the sum of twenty-five hundred sixty-three and $\frac{81}{100}$ dollars, payable nineteen months from its date.

Now, therefore, these presents witness, that the said party of the first part, in order to secure the prompt and punctual payment of the said three promissory notes hereinbefore specified, according to their tenor and effect, and in further consideration of the sum of one dollar, and for other good and valuable considerations to the said party of the first part paid, the receipt whereof is hereby confessed. have and do hereby grant, bargain, sell, alien, release, convey a·

confirm, unto the said party of the second part, and to his heirs, executors, administrators and assigns forever, all the following described premises, situate, lying and being in the county of
33 Cook and State of Illinois, to wit, all that piece or parcel of land in the city of Chicago, being fifty feet front on Jackson street, and one hundred and eighty-nine feet deep, being the west fifty feet of the following described piece of land, to wit, all that part of out-lot now designated block fourteen (14) in the canal trustees' subdivision of the west half, and the west half of the northeast quarter, of section seventeen (17,) in township thirty-nine (39) north, and range fourteen (14) east, of the third (3d) principal meridian, bounded as follows: commencing at the southeast corner of said out-lot fourteen (14,) and running thence west along the south line of said lot, on Jackson street, ninety-two (92) feet; thence north by a line drawn parallel to the east line of said lot, one hundred eighty-nine (189) feet, to an alley; thence east ninety-two (92) feet to the east line of said lot; thence south one hundred eighty-nine (189) feet to the place of beginning. Also, all the right, title, interest and leasehold estate of the said parties of the first part. to the east nineteen (19) feet and six (6) inches of the west half of the west half of lot number seven (7,) in block number twenty-one (21,) in the original town of Chicago, being situate on the north side of Lake street, together with the three story-brick store-building situate thereon, running through from Lake street to South Water street, having a front on each street, on Lake street known as No. two hundred forty (240) Lake street, and two hundred thirty-one (231,) old number, South Water street.

34 The title of the parties of the first part to the last described tract of land is a leasehold for a term of years, for a stipulated payment of rent, which expires the first day of May, A. D. 1869, with certain rights as to the renewal, which lease is transferred in trust, with this indenture. The three-story building situate thereon is the property of the said Sherman, grantor hereof, in his own right, on which there is an insurance policy of six thousand dollars, also transferred in trust with this indenture. It is covenanted and agreed that the said Sherman shall pay the ground rents, according to the terms of said lease, and keep the property insured, as it is now insured, for the benefit of the parties in trust, until the debt hereby secured is fully paid:

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, rents, issues and profits thereof; and also the estate, right, title, interest, dower, right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and any and every part thereof, with the appurtenances: To have and to hold the above described premises and appurtenances unto the said party of the second part, and his assigns, in trust, nevertheless, for the following purpose, to wit, in trust in case default shall be made by the said Oren Sherman, party of the first part,

his heirs, executors, administrators or assigns, to pay the said three promissory notes above mentioned, according to the tenor and effect thereof; or if default shall be made, in whole or in part, in the performance of any of the covenants or agreements herein contained, then, on application of the said Loeschigk, Wesendonck & Co., or the legal holder or holders of the said three promissory, or either of them, and having first given sixty days' notice of the time and place of such sale, by publication in any newspaper published in the county of Cook, in the State of Illinois aforesaid, or by posting up written or printed notices in three most public places in the county where said premises are situated, then it shall and may be lawful for the said party of the second part, or his personal representatives, or his attorney duly authorized by virtue hereof, to enter into and upon all and singular the premises herein granted, or intended so to be, and to sell and dispose of the same, or any part, share or portion thereof, and all right, benefit and equity of redemption of the said party of the first part, their heirs or assigns therein, at public sale, at such hour and place as said party of the second part, or his legal representatives or attorney, may appoint; or to adjourn said sale from time to time, as said party of the second part, or his legal representatives or attorney, may think proper, and as the attorney of said party of the first part, for such purpose duly constituted irrevocably, or in the name of said party of the second part, his executors or administrators, or in such manner as the said party of the second part, or his legal representatives or attorney, may think proper, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple; and out of money arising from such sale, after first paying all costs, charges, fees or other expenses growing out of the management and sale of said premises, including all travelling expenses and time spent going to and from said sale, and all taxes, assessments and liens thereon, to pay the said Loeschigk, Wesendonck & Co., their representatives or assigns, or to the legal holder or holders thereof, the amount which may be then due on said three promissory notes above mentioned, for principal and interest, rendering the overplus of the proceeds of such sale (if any there should be) unto the party of the first part, or their assigns, at the office of said party of the second part, in Chicago, which sale, so made as aforesaid, shall forever be a perpetual bar, both in law and equity, against the said party of the first part, their heirs and assigns, and all other persons claiming or to claim the premises or any part thereof, by, from or under them or any of them, and it shall not be the duty of the purchaser to see to the application of the purchase money; and upon this further trust, that after the said three promissory notes, and all costs, fees and charges accruing by virtue hereof, shall be fully paid and satisfied, then to re-convey back to the said party of the first part, their executors, administrators or assigns, all the right of the said party of the second part, acquired by virtue hereof, to the above described premises, or such part thereof as shall remain unsold, after the satisfac-

tion and discharge of the trust first mentioned aforesaid, said re-conveyance to be made at the cost of said party of the first part.

And the said Oren Sherman and Hannah, his wife, party of the first part, for themselves and their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents they are well seized of the premises above conveyed as of a good and sure, perfect, and indefeasible estate of inheritance in the law in fee simple, and have good right, full power, and lawful authority to grant, bargain, and sell, and convey the same in the manner and form as aforesaid, and that the same are free and clear from all incumbrances of what kind and nature soever, and against all and every person or persons lawfully claiming or to claim the whole or any part thereof the party of the first part will forever warrant and defend, and that they will during the continuance of these presents pay all taxes, assessments, or impositions levied, assessed, or imposed on the above de-
38 scribed premises, or any part thereof, and also to pay all rents and liens thereon whatsoever, and to pay the same before any advertisement or charges accrue against the said premises.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

OREN SHERMAN. [SEAL.]
HANNAH F. SHERMAN. [SEAL.]

Signed, sealed, and delivered in presence of—
P. GRIFFIN.

Signed, sealed, and delivered in presence of—

STATE OF ILLINOIS,
Cook County, ss:

I, Charles B. Farwell, clerk of the county court in and for said county, in the State aforesaid, do hereby certify that Oren Sherman and Hannah F. Sherman, who are personally known to me as the same persons whose names are subscribed to the foregoing deed, appeared before me this day, in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth. And the said Hannah F. Sherman, wife of the said Oren Sherman, having been by me examined, separate and apart, and out of the hearing of her husband, and the contents and meaning of the
39 said instrument of writing having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned, without the compulsion of her said husband, and that she does not wish to retract the same.

[SEAL.] Given under my hand and official seal this 30th day of January, A. D. 1858.

C. B. FARWELL, *Clerk.*

STATE OF ILLINOIS, *County of Cook.* } No. 98,229.

This instrument was filed for record on the twenty-fifth day of February, A. D. 1858, and duly recorded in book 154 on deeds, page 172.

WM. L. CHURCH, *Recorder.*

The said plaintiff, to further maintain the issue on his part, offered and gave in evidence a certain other instrument in writing from E. S. Smith to the plaintiff, with certificate of registry thereon, which is as follows:

This indenture, made this fifteenth day of July, in the year of our Lord one thousand eight hundred and sixty-one, between
40 Ezekiel S. Smith, of the city of Chicago, in the county of Cook and State of Illinois, party of the first part, and Gustavus Kutter, of the city, county, and State of New York, party of the second part, witnesseth:

That whereas Oren Sherman and Hannah Sherman, his wife, of the city of Chicago, in the county of Cook and State of Illinois, did, by a certain deed of trust, dated the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and fifty-eight, which deed is recorded in the recorder's office, in Chicago, in said county of Cook and State of Illinois, in book 154 of deeds, page 172, (as will more fully appear, reference being thereto had,) by which deed the said Oren Sherman and Hannah Sherman, his wife, conveyed to the said party of the first part to this indenture all the premises hereinafter described, to secure to Lœschigk, Wesendonck & Co. the payment of the sum of seven thousand six hundred and ninety-two dollars and ninety-five cents, secured by three promissory notes, dated January 1st, A. D. 1858, one of which is for the sum of twenty-five hundred and sixty-five and $\frac{33}{100}$ dollars, payable in eleven months from its date; one for the sum of twenty-five hundred and sixty-three and $\frac{81}{100}$ dollars, payable in fifteen months from its date; and one for the sum of twenty-five hundred and sixty-three and $\frac{81}{100}$ dollars, payable in nineteen months from its date.

And whereas default hath been made in the payment of the
41 whole three of said notes, and the same being due and unpaid, except the sum of two thousand dollars ($2,000) endorsed as paid upon the note first maturing, "$1,000 Aug. 13, '59," and "$1,000 Sept. 3, '59," at the request of the legal holder of said notes, the party of the first part to this indenture advertised the said premises for public sale at the north door of the court-house in the city of Chicago, in the county of Cook and State of Illinois, on the fifteenth day of July, one thousand eight hundred and sixty-one, at ten o'clock in the forenoon of that day, to the highest bidder for cash, a notice of said sale being published in the Chicago Times, a daily paper published in the said county of Cook, State of Illinois, for more than sixty days previous to the said day of sale, in the manner prescribed in the said deed of trust.

And whereas, upon the day and year and at the time and place specified in said notice, and in pursuance thereof, the land and premises in said deed of trust specified were offered for sale at public auction, and at said sale the said party of the second part to this indenture was the highest and best bidder thereof, and bid for the tracts of land and premises described in said deed of trust, and hereinafter described, the sum of two thousand dollars, ($2,000,) as follows, viz: for "all that piece or parcel of land in the city of Chicago, being fifty feet front on Jackson street, and one hundred and eighty-nine feet deep, being the west fifty feet of the following described
42 piece of land, to wit: all that part of out-lot now designated block fourteen (14) in the canal trustees' subdivision of the west half, and the west half of the northeast quarter of section seventeen, (17,) in township thirty-nine (39) north, in range fourteen (14) east of the third (3d) principal meridian, bounded as follows: commencing at the southeast corner of said out-lot fourteen, (14,) and running thence west, along the south line of said lot on Jackson street, ninety-two (92) feet; thence north, by a line drawn parallel to the east line of said lot, one hundred and eighty-nine (189) feet to an alley; thence east ninety-two (92) feet to the east line of said lot; thence south one hundred and eighty-nine (189) feet to the place of beginning," the sum of one thousand dollars ($1,000,) for "all the right, title, interest, and leasehold estate of the said Owen Sherman and Hannah, his wife, to the east, nineteen (19) feet and six (6) inches of the west half of the west half of lot number seven, (7,) in block number twenty-one (21,) in the original town of Chicago, being situated on the north side of Lake street, together with the three-story brick store building situated thereon, running through from Lake street to South Water street, having a front on each street, on Lake street known as No. two hundred forty (240) Lake street, and two hundred thirty-one (231,) old number, South Water street," the sum of one thousand dollars, ($1,000,) and the same were struck off and sold to said Gustavus Kutter, party of the second part of this inden-
43 ture, for that sum, for the purpose of paying the money due upon said notes, as provided in said deed of trust.

Now, therefore, these presents witness that the said party of the first part, in pursuance of the power and authority in him vested in and by said deed of trust, and in consideration of the sum of one dollar, and also the further sum of two thousand dollars ($2,000,) to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath and doth hereby convey, remise, release, and quitclaim to the said party of the second part, his heirs and assigns, forever, all the right, title, and interest, as well in law as in equity, which the said party of the first part hath, and acquired by virtue of the deed of trust above mentioned, of, in, and to all those certain tracts, pieces, or parcels of land situated in the county of Cook and State of Illinois, and described as follows, to wit: all that piece or parcel of land in the city of Chicago, being fifty feet front on Jackson street, and one hundred and eighty-nine feet deep, being the west fifty feet of the following described piece of land, to wit:

all that part of out-lot now designated block fourteen, (14,) in the canal trustees' subdivision of the west half, and the west half of the northeast quarter of section seventeen, (17,) in township thirty-nine (39) north, in range fourteen (14) east of the third (3d) principal meridian, bounded as follows: commencing at the southeast corner of said out-lot fourteen, (14,) and running thence west along the
44 south line of said lot on Jackson street ninety-two (92) feet; thence north, by a line drawn parallel to the east line of said lot, one hundred and eighty-nine (189) feet to an alley; thence east ninety-two (92) feet to the east line of said lot; thence south one hundred and eighty-nine (189) feet to the place of beginning.

Also all the right, title, interest, and leasehold estate of said Oren Sherman and Hannah, his wife, to the east nineteen (19) feet and six (6) inches of the west half of the west half of lot No. seven, (7,) in block number twenty-one, (21,) in the original town of Chicago, being situated on the north side of Lake street, together with the three-story brick store building situate thereon, running through from Lake street to South Water street, having a front on each street; on Lake street, known as No. two hundred and forty, (240,) Lake street, and two-hundred thirty-one, (231,) old number, South Water street.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversions, remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and any and every part thereof, which
45 the said party of the first part acquired by virtue of said deed of trust.

To have and to hold the aforesaid right, title, and interest of the said party of the first part, unto the said party of the second part, his heirs and assigns forever, as fully and absolutely as the said party of the first part can, by virtue of the power and authority in him by said deed of trust vested, convey the same.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year above written.

EZEKIEL S. SMITH, *Trustee.* [SEAL.]

Signed, sealed, and delivered in presence of—
MILES ALMY.
J. W. CLYDE.

STATE OF ILLINOIS, *Cook County, ss:*

I, Miles Almy, a notary public in and for the city of Chicago, in said county and State, do hereby certify that Ezekiel J. Smith, who is personally known by me to be the same person whose name is subscribed to the annexed deed, appeared before me this day, in person, and acknowled that he had signed, sealed, and delivered the said instrument of writing as his free act and deed, for the uses and purposes therein expressed.

[SEAL.] Given under my hand and notarial seal this 25th day of July, A. D. 1861.

46 MILES ALMY, *Notary Public.*

STATE OF ILLINOIS, *County of Cook.* } No. 46,536.

Filed for record on this 29th day of July, A. D. 1861, and duly recorded in book No. 219, page 374.

WM. L. CHURCH, *Clk.*

Trustee's sale.

Whereas Oren Sherman and Hannah his wife, of the city of Chicago, on the twenty-sixth day of January, eighteen hundred and fifty-eight, executed and delivered to me, the undersigned, as trustee, a deed of trust of the premises therein and hereinafter described, to secure to Loeschigk, Wesendonck & Co., of the city of New York, the payment of the sum of seven thousand six hundred and ninety-two dollars and ninety-five cents, evidenced by three promissory notes of said Oren Sherman, dated January first, eighteen hundred and fifty-eight. One of said notes was for the sum of twenty-five hundred and sixty-five $\frac{33}{100}$ dollars, payable in eleven months from its date with exchange on New York city. One other of said notes was for the sum of twenty-five hundred and sixty-three $\frac{81}{100}$ dollars, payable in fifteen months from its date with exchange on New
47 York city; and the other of said notes was for the sum of twenty-five hundred and sixty-three $\frac{81}{100}$ dollars, payable in nineteen months from its date with exchange on New York city. On the first of said notes there has been paid the sum of two thousand dollars; which said deed of trust bears date the day first aforesaid, and was recorded on the same day in book one hundred and fifty-four of deeds, on page one hundred and seventy-two, in the recorder's office of the county of Cook and State of Illinois, as will appear, reference thereto being had.

And whereas it is provided in said deed of trust that if default be made in the payment of said sum of money, or any part thereof, or of any of the covenants or agreements therein contained, then on application of the said Loeschigk, Wesendonck & Co., or the legal holder or holders of said notes, or either of them, to the undersigned, all the property mentioned in said deed of trust, and all the right, benefit, and equity of redemption of the said party of the first part, their heirs or assigns therein, might be sold by the undersigned at public auction, at such hour and place as he might designate, giving sixty days' previous notice of the time and place of sale, by publishing the same in any newspaper published in the county of Cook, in the State of Illinois.

And whereas default has been made in the payment of the said sum of money, and the interest thereon, except the sum of two
48 thousand dollars, as before stated, and the same is now due and payable according to the terms of said notes and said trust, to wit, the sum of five thousand six hundred ninety-two dollars and ninety-five cents of the principal, together with the interest, and payment thereof has been often requested.

And whereas application has been made to the undersigned by the legal holders of said indebtedness to sell the property described in said deed of trust, or so much thereof as may be necessary to pay the debt due, with interest thereon, and the costs, according to the provisions of said deed of trust:

Now, therefore, by virtue of the power and authority in me vested by the terms of said deed of trust, and for the purposes therein expressed, I do hereby give public notice that, in pursuance of said power and authority, I shall sell at public auction at the north door of the court-house in the city of Chicago, in the county of Cook and State of Illinois, on Wednesday, the first day of May, A. D. eighteen hundred and sixty-one, at ten o'clock in the forenoon on that day, to the highest bidder for cash, the premises in said deed of trust described, the same being situate in the city of Chicago, and described as follows: all that piece or parcel of land in the city of Chicago, being fifty feet front on Jackson street and one hundred and eighty-nine feet deep, being the west fifty feet of the following described piece of land, to wit: all that part of out-lot now
49 designated block fourteen (14) in the canal trustees' subdivision of the west half, and the west half of the northeast quarter of section seventeen (17,) in township thirty-nine (39) north, in range fourteen (14) east of the third (3d) principal meridian, bounded as follows: commencing at the southeast corner of said out-lot fourteen, (14,) and running thence west along the south line of said lot on Jackson street ninety-two feet, (92;) thence north by a line drawn parallel to the east line of said lot one hundred and eighty-nine (189) feet to an alley; thence east ninety-two (92) feet to the east line of said lot; thence south one hundred and eighty-nine (189) feet to the place of beginning. Which tract of land is in fee simple, free from all and other incumbrances whatever. Also all the right, title, interest, and leasehold estate of the said parties of the first part in said deed of trust, being all the right, title, and interest of the said Oren Sherman and Hannah, his wife, in and to the east nineteen (19) feet and six (6) inches of the west half of the west half of lot number seven, (7,) in block number twenty-one, in the original town of Chicago, being situated on the north side of Lake street, together with the three-story brick store building situate thereon, running through from Lake street to South Water street, having a front on each street; on Lake street known as number two hundred and forty (240) Lake street, and two hundred and thirty-one (231,) old number, South Water street, with all the rights and privileges thereunto belonging, of the said Oren Sherman and Hannah, his wife, parties of the first
50 part as aforesaid, their heirs and assigns, together with all their right and equity of redemption therein. To the purchaser of which immediate possession will be given.

E. S. SMITH, *Trustee.*

Dated Chicago, Ill., Feb. 22d, 1861.

The above sale is postponed until the 15th day of May, A. D. 1861, at ten o'clock in the forenoon, at the same place as above advertised.

E. S. SMITH, *Trustee.*

Chicago, May 1, 1861.

The above sale is postponed until the 15th day of July, A. D. 1861, at ten o'clock in the forenoon, at the same place as above advertised.

E. S. SMITH, *Trustee.*

Chicago, May 15, 1861.

STATE OF ILLINOIS,
Cook County, ss:

E. M. Fowler, being duly sworn, doth depose and say that the notice, of which a printed copy is hereto attached, was published in the 'Chicago Times," a newspaper published in the city of Chicago, on the (23d) twenty-third day of February, eighteen hundred and sixty-one, and that the same was continued daily in the same paper until May first, eighteen hundred and sixty-one, and then the notice was continued with the postponement, as stated, until the
51 fifteenth day of May, and from then continued with further notice of postponement, as stated, until the fifteenth day of July, eighteen hundred and sixty-one.

E. M. FOWLER,
For Chicago Times.

Subscribed and sworn before me this 16th day of July, A. D. 1861.
MILES ALMY, *Notary Public.*

The plaintiff, to further maintain the issue on his part, called Miles Almy as a witness, who, being duly sworn, testified and said: My name is Miles Almy. Know the defendant Solomon A. Smith. Know the premises in controversy, called the Sherman store. On May 24th, A. D. 1862, Mr. McCagg and defendant came to Mr. E. S. Smith's office and wanted the keys to the Sherman store; think they demanded the keys, and Mr. E. S. Smith refused to give them up unless they would take them with the understanding that it should not prejudice Mr. Kutter's rights. Mr. Smith was acting for Mr. Kutter. Mr. E. S. Smith gave them the keys. Mr. McCagg and defendant were both there, and I don't now remember which one took the keys. Think McCagg and defendant came together to Smith's office. I don't remember whether defendant came before McCagg came,
52 or not. I saw defendant in the office before Mr. McCagg, and he was there together, but I can't remember whether it was the same day or not. Don't remember seeing defendant at Smith's office before McCagg came on that day. At the time they took the keys don't recollect of anything else being said.

Cross-examined.

At this time was bookkeeper for E. S. Smith. Nothing was said in my presence about default of Kutter in paying the rent. I was called into the room while they were there, but did not hear all the conversation.

The plaintiff, to further maintain the issue on his part, called as a witness E. S. Smith, who, being duly sworn, testified that he knew the parties to the suit.

In answer to questions put by defendant's counsel said: I have no interest in the suit. There is no understanding that the benefits of this suit shall accrue to me. In May last I was the agent and attorney of plaintiff in this matter. Some time last summer, before this suit was commenced, I think before July, the defendant came to my office and asked me if I had the keys to the Sherman store on Lake street. I told him the keys were in my office; that they were left there by some person in my absence, who it was I did not know.

53 He said he wanted them; that he had taken possession of the store, and wanted to rent it, or was going to rent. I went and got the keys and gave them to him. I think I said I did not know how the keys came at my office, and did not want them, or had not called for them; that I would give him the keys, but in doing so, it should not prejudice my client's rights. He said he had declared the lease between Link & Sherman forfeited. I asked him to give me that in writing, or asked him if he would give it to me in writing. I think his reply was, I could make a note of it if I liked. There was a considerable talk for a moment or two. (Defendant's counsel here requested witness to state all that was said.) I think he said Sherman had not paid the rent; am not positive about it. I think I told him the rent was so high that no man could pay it. I told him I would take a lease for Mr. Kutter at a fair price for the ground rent, and that whatever we agreed upon should be paid, or we would take much less than the building was worth and convey to him all of plaintiff's title which he obtained on the trust deed against Sherman. He said the building had stood vacant long enough, and ought to be rented. I replied that I had several times said to parties, when they applied to know if the building could be rented, that it could be rented if defendant would consent. In July last I called on the defendant and gave him a paper of which this is a copy.

54 To Solomon A. Smith, Chicago, Ill.:

You are hereby notified that Gustavus Kutter now offers to join you in having the brick store building known as 240 Lake street appraised according to the provisions of the lease given by John Link to Orrin Sherman.

You are hereby further notified that I, said Gustavus Kutter, was the purchaser of the brick building No. 240 Lake street, running through to Water street. That he purchased the same at a trustee's sale made upon a deed of trust given by Orrin Sherman to E. S.

Smith, in trust to pay a debt to Messrs. Loeschigk, Wesendnck & Co., which deed was recorded in the office of the recorder of deeds for Cook county, in book one hundred and fifty-four (154) of deeds, on page one hundred and seventy-two (172.)

You are hereby further notified that, because of your declaring the lease between John Link and Orrin Sherman for the ground rent of the lot on which said brick building stands, and the term thereof ended, you by the means thereof became liable and obliged to pay the value of the building, to be ascertained by appraisal as stated in said lease, one to be chosen by each party, and the two to select
55 a third, a majority to decide the value of the building.

You are hereby notified that I, said Gustavus Kutter, now offers and demands of you that an appraisal of the building be had as thus provided, and you pay the amount in money to me, as you are in law bound to do, and in justice ought to have done long before this time.

You are hereby further notified that an appraiser has been selected on my part, and that you are required to select an appraiser on your part, that the two may select a third and proceed to appraise the building, before mentioned, now upon the lot described as follows: "The east nineteen feet and six inches of the west half of lot number seven, in block number twenty-one, (21,) in the original town of Chicago, number 240 Lake street. All of which is respectfully submitted to you in notice as herein stated, and for the purposes herein stated, which you will in nowise omit.

July 16th 1862.

GUSTAVUS KUTTER,
By E. S. SMITH,
Ag't and Att'y in fact.

Rec'd a copy of this notice July 22, 1862.
SOLO. A. SMITH, *Trustee.*

56 I told him I wanted a fair understanding of the matter. I wanted to make a demand that the building be appraised under the lease; that I had drawn up what I wanted, and wished him to sign a duplicate as having received it a few days after it was returned to me signed.

Cross-examined.

I was trustee in deed for Sherman to Loeschigk *et al.* I think all this firm resided in New York. Plaintiff is one of this firm. The property was bid off in Kutter's name. I don't know whether Kutter was in Europe at the time the sale was made. I think defendant said to me more than once that there was rent due and unpaid. I don't know that defendant called on me to pay rent as Kutter's rent; he asked me if my parties, the plaintiff and his partners, were going to pay any rent; he may have said my client. I said we were not going to pay the rent as fixed in the lease to Sherman. I said Kutter was not obliged to pay the ground rent at all under that lease, as the

covenants were with Sherman; that the lease provided a mode by which they could collect their rent; that I considered it like any other debt; I considered that plaintiff had a right to the building,
and could take it down and take it away, if he saw fit, if they
57 would not take a fair rent for the gound. I can't say where
Kutter was at this time. I may have said that one of the plaintiff's firm was away in Europe. I did not learn from defendant or any one else the amount of rent which was in arrear. I learned it within a day or two since. I always refused, as Kutter's agent, to pay the rent under the Link lease to Sherman, as I considered it too large a rent.

Direct examination resumed.

I don't recollect that these conversations were until after defendant had the keys. If defendant said anything to me about paying the rent, I think it must have been before he told me he had forfeited the lease. It is my impression that defendant asked me if we were going to pay the rent; it was before he declared the lease forfeited. He never told me the amount of rent due. Def't never demanded any particular amount of rent due under the lease.

On the said, plaintiff then called as a witness on his part, Oren Sherman, who, being duly sworn, testified and said: My name is Oren Sherman. I am the grantor in the trust deed from Sherman
to Smith. I know defendant. I know the premises in
58 controversy. I cannot well tell when the erection of the
building was first commenced. I think the last addition I made to the building was in the spring of 1858; a part I built in 1856 or 1857, and a portion was built previous to that time by my brother. A portion of the building was built prior to 1857.

In May, 1862, the value of the building was from $4,000 to $5,000. The building runs through from Lake street to Water street, and has two fronts. I first took possession of these premises, I think, two or three years before I gave Mr. Smith the trust deed. I first held it under a lease held by my brother, which he assigned to me. I afterwards had a lease from Mr. Link—(the lease from Link to Sherman now shown me.) This is the lease. At the time I received this lease a part of the present building was erected.

Cross-examined.

Since the lease was made I tore out the Lake street front and built over the Lake st. front. It is three stories and basement in front and rear. It has never been raised. I have been engaged for a few years in building business, and dealing in building material, marble business, &c. I estimated the value from my experience and the quantity of material in it. I have stated as near as I could what the
building was worth in May last. I think it would cost what I
59 have stated to put the building there. I think I was in the
building in May last. From the best of my judgment I should

consider the building in May last worth $4,500 in cash; it cost me more than that to build it. This is the building itself, without regard to anything connected with it. In reference to the lease: Taking into consideration the question of the lease, &c., and the ground rents, I should consider the building worth $2,500 or $3,000, with all the incumbrances, including all the back rents due on the lease.

And thereupon the counsel for defendant proposed to prove by said witness, that on the first day of May, A. D. 1862, there was due and owing from said witness to said defendant one quarter of a year's rent for the premises in said lease described, and then asked said witness the following question: "Was the quarter's rent due May 1st, 1862, by the lease, paid?"

Thereupon the plaintiff's counsel objected to the question, upon the ground that the question was not pertinent to the issue under the plea.

The court overruled the objection and allowed the witness to answer, to which ruling of the court the plaintiff's counsel then and there excepted, and thereupon said witness answered:

60 "It was not paid to my knowledge; I did not pay it. I was in possession up to July 15th, 1861. On May 1st, 1862, there were several quarters of rent due and unpaid, as I suppose; on the 15th of July, 1861, there was due some rent; my impression is that on May 1st, 1862, there was a year or two years' rent due, but don't know how much."

(Here the defendant's counsel handed the witness a paper, and in answer to a question he said:)

"I received a copy of a paper similar to the one here shown me. I received a notice that defendant was intending to declare the lease forfeited. I was not in possession M. 2d, 1862; I have never collected any rents since the sale on the trust deed, up to that time. I collected rents from parties who occupied it after the sale on the trust deed. I did not collect the rents. I think the building was occupied during last winter and spring; Vincent & Nimrod occupied a part. Don't know of any rent being paid to E. S. Smith or Kutter. I have had no place of business in the building since the sale; there was a desk and safe in the building, but they did not belong to me; the building was closed some months after the sale under the trust deed."

Re-direct examination resumed.

The value of the building was greater in October last than in May last; it has increased in value. Water street has been raised and paved, which makes property more desirable. After the sale

61 on the trust deed, Vincent, Liffels & Co. occupied a part, and Mr. Barker occupied the balance of the building. Mr. Barker occupied it 6 or 8 months, and perhaps longer; don't know whose tenants they were after the sale on the trust deed; I claimed no rights; they went in under me.

Here the plaintiff rested his case.

The defendant then, to maintain the issue on his part, called James H. Rice as a witness, who being duly sworn, testified as follows:

My name is James H. Rice, and am a carpenter and builder; have always been such since large enough to shove a jack-plane; I know the premises; have examined them; I first knew them November, present month, the fifth or sixth; made estimate at that time of the value; I valued the building at $2,614 21; I went there at the request of Mr. E. S. Smith; could not tell how much the value differed in May last than now.

Cross-examined.

I estimated them in the condition I found them, November 5th or 6th, 1862.

Re-direct.

I went through the building; some portion has been neglect-
62 ed—other parts not.

Cross-examination resumed.

I estimated the value at $3,200, and deducted the depreciation, so that I came to the amount given as the present time.

The defendant then called James E. Gay, who being duly sworn, testified as follows:

My name is James E. Gay; in May last I collected rent for defendant on this and other property; May 1st, 1862, I went with the defendant to the property in question to demand rent due May 1st, 1862, a few minutes before sundown. Mr. Smith made demand for quarter's rent on lease, due May 1st, 1862; he did not get it; the building was closed; we went to Lake street and Water street entrances; defendant declared lease forfeited.

Cross-examined.

We did not get into the building; we stayed right in front of the door; we did not see Mr. Sherman or any one else; then Mr. Smith made a demand for the rent due; we didn't see any one; we made the demand of Mr. Sherman or whoever it might concern; this was all Mr. Smith did; I think he declared the lease forfeited there at the time; I served notice on Mr. Sherman, copy of which was shown to witness, Sherman.

63 *Direct examination resumed.*

Mr. Smith declared the lease forfeited for non-payment of the rent; the building is now occupied. I think Mr. S. A. Smith, the defendant, leased the Water street portion in May; the Lake street front was leased by Mr. S. A. Smith last month.

The defendant gave in evidence the copy of notice, which is as follows:

To OREN SHERMAN, Esq.:

You will please to take notice that I have elected, (and do hereby give you notice of my election,) under the terms and conditions of that certain lease made the first day of May, A. D. 1857, by John Link to you, for all those premises situate, lying, and being in the city of Chicago, in the county of Cook, and in the State of Illinois, known and described as follows, to wit: the east nineteen feet and six inches (19 $\frac{6}{12}$) of the west half of the west half of lot number seven (7,) in block number twenty-one (21,) in the original town of Chicago, to declare the term in and by said lease created determined and ended, by reason and on account of default in the payment of the quarter's rent that became due on said lease by the terms thereof, on the first day of May, A. D. 1862.

CHICAGO, May 2d, 1862.

SOLOMON A. SMITH,
Trustee and assignee of John Link, Leasor.

64 Copy of the within notice served on Oren Sherman, May 2d, 1862, at 1.45 p. m.

JAMES E. GAY.

The defendant, to further maintain the issue on his part, gave in evidence a writing, which is as follows:

Know all men by these presents, that I, John Link, of the city of Chicago, in the county of Cook and State of Illinois, in consideration of the sum of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, have assigned, transferred and set over, and by these presents do assign, transfer, and set over to Solomon A. Smith, also of the said city of Chicago, all that certain lease, dated 1st Nov., A. D. 1857, made by me to L. D. Olmsted, of said city of Chicago, wherein and whereby there was leased to said Olmsted rooms number 1 and 2 in the 2d story of the iron building situated on the corner of Lake and La Salle sts., in the said city of Chicago, from the said 1st day of Nov., A. D. 1857, for, during and until the 1st day of May, A. D. 1861, at an annual rent of $900 per annum, payable quarterly, to wit, on the 1st days of Feb'y, May, Aug., and Nov., during said term, and also all rent to become due on the same from and after the 1st day of May next, and also that certain lease made by and between myself and Edward Mendell,
65 of said city of Chicago, in and by which there is demised and leased to said Edw'd Mendell the 5th story of the iron building, on the corner of Lake and La Salle sts., and the north room in the 4th story on La Salle st., said room in the 4th story being No. 18, from the 1st day of Feb'y, A. D. 1858, until the first day of Feb'y, A. D. 1863, at an annual rent of $800, payable quarterly in payments of $200 each, to wit, $200 on the first days of May, Aug., Nov., and Feb'y, during said term, and also all rents to become due on the same from and after the 1st day of May next; and also that

certain lease made by and between myself and John C. Garland and John W. Tremper, of the said city of Chicago, in and by which there is demised and leased to said Garland and Tremper the 1st floor and basement in the west store of the Corinthian block, together with the vaults and closets connecting therewith—said store and basement is situated on Lake st. and adjoining the corner of La Salle st., in the city of Chicago, from the 1st day of April, A. D. 1858—until April 1st A. D. 1863, at an annual of $3,000 per annum for the first 3 years, and $3,250 per annum for the next 2 years, payable quarterly, and also all rent to become due on the same from and after May 1st, 1859; and also that certain lease made by and between myself and Oren Sherman, of the city of Chicago, in and by which there is demised and leased to said Oren Sherman all those certain premises situate, lying and being in said city of Chicago, known and described as follows, to wit, the E. 19 ft. and (6) inches (19 $\frac{6}{12}$) of the west $\frac{1}{2}$ of lot No. 7, in block No. 21, in the original town of Chicago,
66 from May 1st, A. D. 1857, to May 1st, A. D. 1869, at an annual rent of $300 per annum for the 1st 2 years, and $1,170 per annum for the next ten years ensuing, payable quarterly, viz., on the first days of Aug., Nov., Feb., and May, during said term, with the right in me, the said John Link, at the expiration of 10 years from May 1st, 1859, either to purchase the building erected on said leased premises at the appraised value at the time, or renew the lease of the said demised premises for 10 years longer, upon certain terms in said lease specified, and also all rent to become due on the same from and after 1st May next; and also that certain lease made by and between myself and J. H. Burch & Co., of said city of Chicago, in and by which there is demised and leased to said J. H. Burch & Co. that certain room in the SE. corner of the iron building erected by me on the NW. corner of Lake and La Salle sts., in said city of Chicago, from the 1st day of May, A. D. 1858, to May 1st, 1861, at an annual rent of $2,500, payable quarterly, with the right in the said J. H. Burch to return possession of said premises from 2 years from said May 1st, 1861, upon certain terms in said lease specified, and also all rent to become due on the same from and after May 1st, 1859; and also that certain lease made by and between myself and Thompson J. S. Flint and C. Thatcher Wheeler, of said city of Chicago, in and by which there is demised to said Flint and Wheeler that certain room, being on the south side of the iron building erected by me on the NW. corner of Lake and La Salle sts., in said city of Chicago,
67 said room fronting on La Salle st. and being in the rear of the premises above described, as rented to J. H. Burch & Co., at an annual rent of $1,200, payable quarterly from May 1st, A. D. 1858, to May 1st, A. D. 1861, and also all rent to become due on the same from and after May 1st, 1859:

To have and to hold said leases, and each of them, to him, his successor or successors, heirs, and assigns, in trust, nevertheless, for the following purposes, to wit:

Whereas I, the said John Link, am indebted unto Walter Laflin, of Pittsfield, Mass., in the sum of $60,000, secured to be paid by 60

bonds, each bearing date April 18th, 1857, each conditioned for the payment of one thousand, which said bonds, or the sums of money secured thereby, by the terms thereof, together with an extension of time of payment of the same, are to become respectively due as follows :

$5,000,	May 15th,	1864.
"	"	1865.
"	"	1866.
$45,000	"	1869.

And which said bonds and each of them draw interest, and interest is to become due and payable thereon at the rate of 10 per cent. per annum, payable quarter-yearly on the 15th days of Aug., Nov., Feb., and May, until the same, or the principal sum of money secured in and by the same, shall be fully paid, as appears by coupons or interest notes accompanying said bonds, and each instalment of interest
68 to become due thereon are, by the terms of said extension, payable at such place in the city of N. Y., in the State of N. Y., as the said Laflin, his executors, administrators, or assigns, may in writing from time to time appoint, and in default of such appointment, then to the credit of the said Walter Laflin, his ex., ad., or as., at the office of Campbell, Hall & Co., in said city of N. Y., in trust to collect and receive the rents becoming due on said leases, and each and every of the same, as far as the same may be collected, and to apply the same first in payment of a certain promissory note made by me about Ap'l 15th, 1859, for the sum of $1,000, payable 3 months from date, to the order of said Laflin, at the office of Campbell, Hall & Co., in the city of N. Y. Second, in payment of a certain other note made by me, dated Ap'l 15th, 1859, for the sum of $2,450, and payable 4 months from date, to the order of said Walter Laflin, at the office of said Campbell, Hall & Co., in said city of N. Y. And afterwards, and at all times, until said principal sum, and each and every instalment thereof, and all int. thereon, shall be fully paid and satisfied, to collect and receive said rents, and each and every part thereof, so far as the same shall be collectable, and to apply the same in payment of any sum or sums of money that he, the said trustee, may or shall from time to time deem it advisable to pay for insurance, or premium, or premiums of insurance on said property described in this memorandum, or in the trust deed given to secure the indebtedness herein described, or any part
69 thereof; the right being hereby given to said Smith, his successor or successors, heirs, or assigns, to insure from time to time, if said Link, his heirs or assigns, shall neglect to do the same, the property in said trust deed, or any part or portion thereof, and to deduct the am't or am'ts from time to time paid therefor, out of the said rents; it being distinctly understood that nothing herein contained is intended or shall be so constructed to relieve said Link, his heirs, ex., ad., or as., from their covenant in said aforementioned trust deed contained to keep said property insured, or to relieve him or them from any liability, forfeiture, or condition in said trust

deed contained, arising or growing out of any default or neglect of him, said Link, his heirs, ex.. ad., or as., to insure or keep insured said premises in said trust deed described, or any part of the same; and also until said principal sum is paid, and each and every part thereof is fully paid and satisfied, to pay and discharge each instalment of interest, or interest coupon, becoming due on said bonds, and each of them, after 1st day of May next. at the time and place at which the same severally become due and payable, appropriating to that so much of said rent as shall be necessary for that purpose, including the payment of exchange and charges connected therewith; and lastly to return to said Link, his ex., ad., or as., at the office of said Smith, his successor or successors, ex., ad., or as., from time to time, so much money (if any) as shall remain in his or their hands after fully paying the quarter's interest due, next after said rents
70 become due; and it is covenanted and agreed by said Link that this instrument shall be, and shall be construed to be, and is hereby declared to be, an assignment, not only of said leases above described; but also of any and all leases which shall or may be made at any time hereafter of said premises above described, and each and every part thereof, up to the time when said principal sum of $60,000, and each and every instalment of interest thereon, shall be fully paid and satisfied; said Link hereby covenanting, in consideration of said loan of $60,000, in said trust deed described, and of the extension of the time of payment of the same, hereinbefore referred to, that he, as soon and as often as any one of said leases above described shall fall in or expire by lapse of time, or for any other reason, or in any other way, will relet said premises, the lease of which shall have expired, as soon as the same can be relet; and such new lease of said premises, so from time to time made, shall be considered to be, and by this instrument is assigned to said party of the second part hereto, his successor or successors, heirs or assigns, as soon as made; and the rent to become under or upon the same shall be payable to, and may be collected by said party of the second part hereto, his successor or successors, heirs or assigns; and that always until as aforesaid said principal sum of $60,000, and all interest thereon, shall be fully paid and satisfied, said Link, his heirs or assigns, shall, as often as any lease on said premises above described, or any part thereof, shall expire, relet the same as aforesaid,
71 as soon as the same can be relet, and that each and every lease and reletting, so as aforesaid made, shall be for the benefit of the said party of the 2d part, for the purpose aforesaid, he to collect the rent on the same, and apply it as aforesaid. And said Link, for himself, his heirs, ex., ad., and as., further covenant in consideration as aforesaid, that if, at any time, and whenever, and as often as by reason of a depreciation of the value of the property above described, or by reason of a reduction of rents, or by reason of the expiration of a lease or leases, and a failure to relet, or in any other way, the aggregate am't of annual rents above assigned, to wit, the sum of $9,750, he the said Link will at once assign other lease or leases to said party of the 2d part, his successor or successors, heirs,

or assigns, sufficient to make up the deficiency, so as at all times to keep the annual rents so assigned up to the sum aforesaid. All rents on such leases so assigned to be collected as aforesaid by said party of the 2d part, his successor or successors, heirs or assigns, and applied as aforesaid. It being understood that said party of the second part, his successor or successors, heirs or assigns, shall not charge or receive a compensation for collecting said rents, or any part or portion of the same, if said rents are promptly paid; but if delay shall occur in the payment of said rents, or any part thereof,

72 and said Smith, or his successor or successors, heirs or assigns, shall in any way aid said Link, his heirs or assigns, in the payment of said interest coupons, or any of them, or make any advances on ac't of said interest or insurance, he or they shall receive such compensation for the same as shall be fair and reasonable. And the said Laflin, his heirs, ex., ad., or as., shall have the right, in the case of the sickness or death of said Smith, to appoint some suitable and proper person to act as such trustee, which appointment, when made in writing, and said Link, his heirs, ex., ad., or as., notified of the same, either by personal notice, or by advertisement, in any daily newspaper, published in Chicago, shall fully and absolutely vest in such person so appointed, all the rights, powers, and duties of the said Smith, acquired under and by virtue of this memorandum or instrument, as fully and entirely as though he had been originally appointed such trustee by this instrument, in the place and stead of said Smith; such new trustee to give security as is hereinafter given by said Smith for the faithful performance of his trust. But neither said Smith nor said new trustee or trustees, if any are appointed, shall be liable for any error of judgment or mistake, but only for wilful default or neglect, or want of honesty. And so from time to time, as often as by reason of sickness or death it shall seem necessary to said Laflin, his heirs, ex., ad., or as., so to do, he or

73 they may appoint a new trustee under this instrument, which appointment, when made by him or them, shall fully vest in such new trustee, all the right, powers, and duties by this instrument conferred upon or assumed by said Smith as said trustee; and the said Smith covenants and agrees with said Link, his heirs, ex., ad., or as., that he will take upon himself the execution of said trust, and that he will pay over and apply the rents so from time to time collected by him on said leases, and such new leases as shall be made from time to time in the manner above specified. And the said Link hereby makes, constitutes, and appoints said Smith and his successor, from time to time, whoever the same may at the time be his att'y, irrevocably for the purposes aforesaid, in his, said Link's, name, or in the name of said trustee, to collect and receive all said rents, and each and every part and parcel thereof, and to give proper discharges and acquittances therefor, and to compromise, compound, or arrange any sum or sums of rent at any time being due or becoming due under any one or more of said lease or leases, or all of them, hereby intending to give to said trustee, whoever he may be, full power and authority to act in all things concerning the premises, in

as full and ample a manner as said Link could do, if this assignment and agreement had not been made, and said Link was personally present and acting.

In witness whereof, the parties hereto have hereunto set
74 their hands and seals this 11th day of April, A. D. 1859.

JOHN LINK. [SEAL.]
SOLOMON A. SMITH. [SEAL.]

Witness: JAMES E. GAY.

I, Mather Laflin, of the city of Chicago, in consideration of $1, to me in hand paid by John Link above named, do guaranty the faithful performance on the part of S. A. Smith, above named, of each and every covenant and agreement contained to be by him performed and kept.

MATHER LAFLIN.

CHICAGO, *Ap'l* 11, 1859.
Witness : JAMES GAY.

No. 17,748. Filed May 11th, 1859.

And no further or other evidence being offered by either of said parties, the plaintiff's counsel asked the court to instruct the jury as follows:

1st. The plaintiff asks the court to instruct the jury that the defendant had no right to take the building upon declaring the lease ended, without paying the plaintiff the value thereof.

2d. The plaintiff asks the court to instruct the jury that the defendant, on refusing to appraise the property and pay the plain-
75 tiff the value thereof, after he had taken possession thereof, became liable to pay the plaintiff the value of the property at the time of his taken possession thereof.

3d. That if the jury believe from the evidence that the defendant took possession of the building against the plaintiff, and terminated the lease, then the defendant would be liable to pay the plaintiff value of the building at the time, after deducting the ground rent due at the time of taking possession.

All of which instructions the court refused to give, as requested by plaintiff's counsel, and to which refusal the plaintiff then and there excepted.

The court instructed the jury *inter alia*, as follows: By the terms of the lease from Link to Sherman, it seemed to be contemplated that the lessee should have power to put improvements upon the land which might remain there on the 1st of May, 1869, ("ten years from the 1st day of May, 1859,") and it was by the terms of the lease then left optional with the lessor to purchase the buildings erected on the land at an appraised value, or renew the lease for ten years longer; but up to that time, that is to say, till May, 1869, the clause of forfeiture for the non-payment of rent was nevertheless in force and binding on the lessee, and notwithstanding improvements may

have been in the mean time put upon the land, if the lessee
76 did not pay the rent according to the terms of the lease, it was competent for the leasor to declare "the term" ended, and to re-enter, and in case of a determination of the lease in that way prior to the time fixed, (viz: May 1st, 1869,) no provision seemed to be made by the lease for the payment by the leasor of any improvements put by the leasee upon the land, and in the case supposed, in the absence of such provision, the leasee could not recover for the improvements; and the plaintiff can be in no better position than Sherman. Consequently, if the jury believe from the evidence, that on the 1st day of May, 1862, there was (according to the terms of the lease) rent due and in arrear, unpaid, after demand made for the payment thereof, and the leasor or his assignee exercised the option given by the lease and declared "the term" ended, and re-entered and took possession of the premises, of which the leasee and his assignee had due notice then the plaintiff cannot recover against the defendant in this action the value of the improvements put upon the land by Sherman or his assignee. To which opinion and instruction of the court the plaintiff then and there excepted.

THOMAS DRUMMOND. [SEAL.]

Endorsed: Filed Nov. 25th, 1862.

WM. H. BRADLEY, *Cl'k.*

77 And afterwards, to wit, on the 27th day of November, A. D. 1862, said plaintiff, by his attorneys, came and filed their writ of error in the words and figures following, to wit:

Writ of error.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, wherein Gustavus Kutter is the plaintiff and Solomon A. Smith is the defendant, a manifest error hath happened, to the great damage of the said plaintiff, Gustavus Kutter, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, you are hereby commanded, if judgment be therein
78 given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to

be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the eighty-seventh year.

[L. S.]

W. H. BRADLEY, *Clerk.*

Endorsed: Filed Nov. 27th, 1862.

W. H. BRADLEY, *Cl'k.*

79 And afterwards, to wit, on the 29th day of November, A. D. 1862, said plaintiff, by his attorneys, came and filed his appeal bond in this behalf, in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, Gustavus Kutter, of the city, county, and State of New York, as principal, and John R. Parsons, of the city of Chicago and State of Illlinois, as surety, are held and firmly bound unto Solomon A Smith, of said city of Chicago, in the sum of five hundred dollars, to be paid to the said Solomon A. Smith, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 28th day of November, A. D. 1862. Whereas the above-named Gustavus Kutter hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the circuit court of the United States of America, eighth circuit,
80 and northern district of Illinois, in a certain action of trespass on the case wherein the above-named Gustavus Kutter is plaintiff, and the above-named Solomon Smith is defendant, now, therefore, the condition of this obligation is such that the above-named Gustavus Kutter shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall remain in full force and effect.

GUSTAVUS KUTTER, [SEAL.]
Per E. S. SMITH, *Ag't & Att'y.*
JOHN R. PARSONS, [SEAL.]

Endorsed: Approved.

THOMAS DRUMMOND.

Filed Nov. 29th, 1862.

WM. H. BRADLEY, *Cl'k.*

81 And afterwards, to wit, on the 2d day of December, A. D. 1862, in the said plaintiff, by his attorneys, comes and files the citation herein in the words and figures following, to wit:

Citation.

UNITED STATES OF AMERICA, *ss:*

To Solomon A. Smith, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit and northern district of Illinois, wherein Gustavus Kutter is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness this 29th day of November, in the year of our Lord, 1862.

THOMAS DRUMMOND.

82 I hereby accept service of the above citation, by copy, this 29th day of November, A. D. 1862.

SCAMMON, McCAGG & FULLER,
Att'ys for Def't Smith.

Endorsed: Filed Dec. 2d, 1862.

WM. H. BRADLEY, *Clerk.*

83 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings had in the cause wherein Gustavus Kutter was plaintiff, and Solomon A. Smith, defendant, as the same appears from the records of said court now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Chicago, this 5th day of [SEAL.] December, A. D. 1862, and of our independence the 87th year.

WM. H. BRADLEY, *Cl'k.*

84 Supreme Court of the United States of America, of the December term, A. D. 1862.

GUSTAVUS KUTTER, plaintiff in error, *vs.* SOLOMON A. SMITH, defendant in error. } Error to the circuit court of the United States for the northern district of Illinois.

Assignment of errors.

And afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United

States of America, comes the said Gustavus Kutter, by E. S. Smith, his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, in this, to wit:

1st. The court erred in overruling the objection made by the plaintiff below to the defendant proving, under the issue, that there was rent due on the lease the first of May, 1862.

2d. The court erred in refusing to give to the jury instruction No. 1, asked by the counsel for plaintiff in error.

3d. The court erred in refusing to give to the jury instruction No. 2, asked by the counsel for plaintiff in error.

4th. The court erred in refusing to give to the jury in-
85 struction No. 3, asked by the counsel for plaintiff in error.

5th. The court erred in instructing the jury that the plaintiff below could not recover against the defendant, if the jury should find from the evidence that there was rent due upon the lease on the first day of May, 1862.

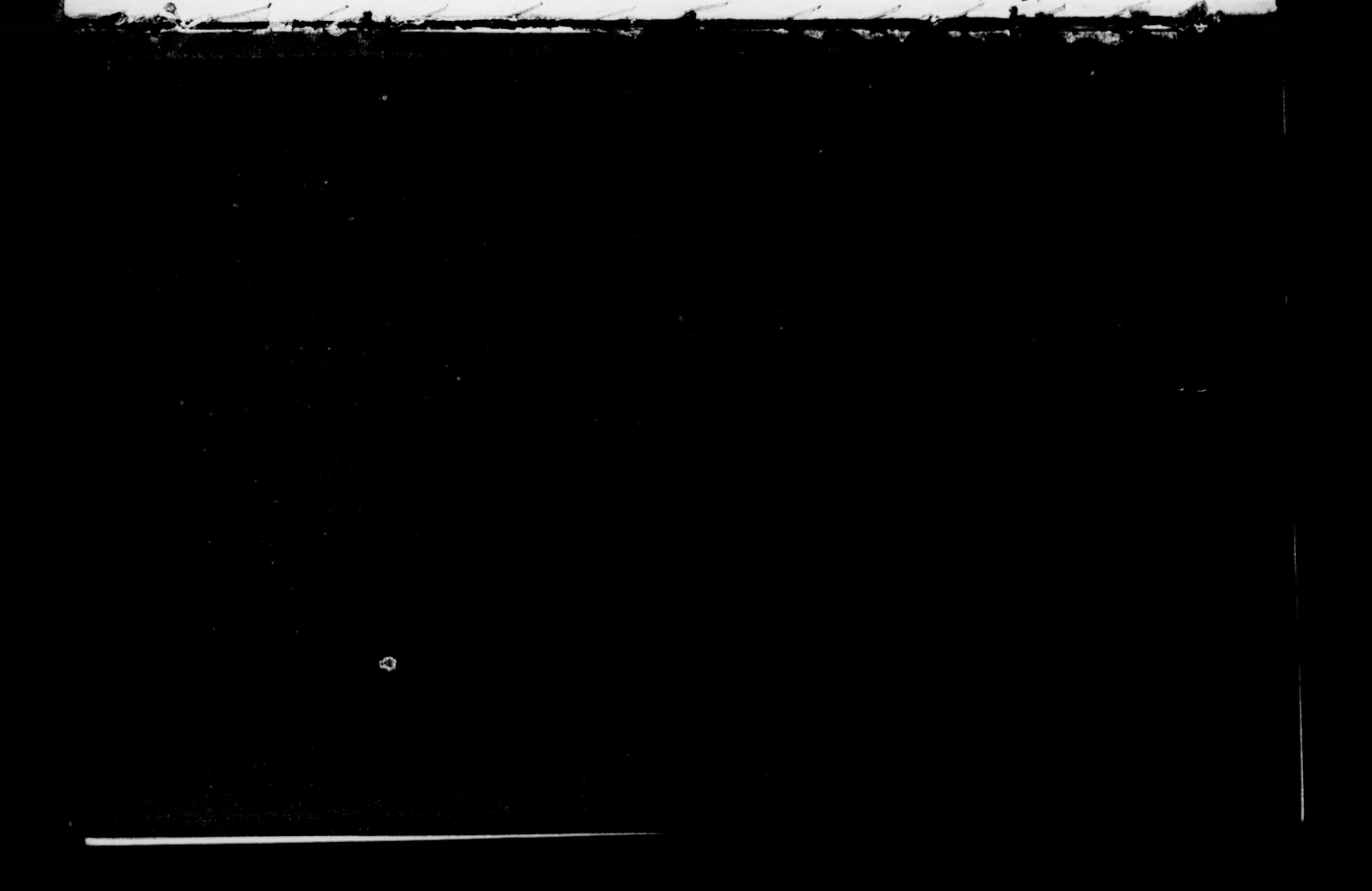
6th. The court erred in instructing the jury that it was competent for the lessor to declare the term of the lease ended, and to re-enter, and in case of the determination of the lease in that way, prior to the time fixed, viz, May 1st, 1869, then the lessee could not recover for the improvements, and the plaintiff was in no better position than Sherman; that the plaintiff could not recover against the defendant.

7th. The court erred in its instructions to the jury as to the legal construction of the lease and rights of plaintiff, after the forcible entry by defendant and taking possession of the building put upon the land by Sherman, and terminating the lease.

And the said Gustavus Kutter prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and for naught held, and that he may be restored to all things which he has lost by occasion of said judgment.

By his attorney, E. S. SMITH.

Filed 23d Dec., 1862.



IN THE

United States Supreme Court,

DECEMBER TERM, 1864—No. 99.

GUSTAVUS KUTTER,
Plaintiff in Error,

vs.

SOLOMON A. SMITH,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR PLAINTIFF IN ERROR.

CHICAGO:
BEACH & BARNARD, PRINTERS, 14 S. CLARK ST., CHICAGO.

1864.

STATEMENT OF THE CASE.

This was an action on the case to recover the value of a building upon a lot under lease, the defendant having taken possession of the same upon declaring the term ended, without right or authority of law.

The declaration charged the defendant with unlawful acts over the property of the plaintiff, and claimed the damages sustained by him, from the consequences of such unlawful acts.

The defendant interposed a plea of not guilty.

The facts, as appears by the record, are briefly as follows:

Some time in 1856 Orrin Sherman had a lease from John Link, for a certain lot, on Lake street, in Chicago, described as the east 19½ feet of the west half of lot 7, in block 21, in the original town of Chicago. Sherman, as it appears from his testimony, was assignee of a lease of prior date to the one in the record, it having first been given to his brother, and under that lease he built a portion of the building on the lot, which was prior to 1857 (see record, p. 25, fol. 58).

On the 1st of May, 1857, the lease set out in the record was given by Link to Sherman (see p. 10, fol. 26 to 31), for the same lot, the term of which was twelve years, at a yearly rent of three hundred dollars a year for two years, and eleven hundred and seventy dollars a year for the remaining ten years—the rent to be paid quarterly. Sherman was to pay taxes, water rents and assessments charged on the premises, in addition to the stipulated rent during the existence of the lease.

The lease further provided, that in case default was made in any of the covenants to be kept by Sherman, the lessee, his executors, administrators, or assigns, then Link, the lessor, his executors, administrators, agent, attorney, or assigns, had the right to declare the term ended and take possession of the premises, using force necessary to repossess and enjoy the premises, *as in his first and former estate*, and to distrain for any rent that might be due on the lease, upon any property belonging to said Sherman, he waiving all legal rights which he might have to hold or retain any such property under the exemption laws of the State, *meaning and intending* to give the lessor, his heirs, executors, administrators or assigns, a valid and first lien upon any and all *goods, chattels or other property belonging to Sherman, as security for the* payment of the rent (p. 12, fol. 27–29).

Said lease also provided that if at any time *said term shall be ended*, at the election of Link, his heirs, executors, administrators, or assigns, or in any other way, Sherman, his executors, administrators, and assigns, covenanted to deliver up the demised premises and property, peaceably, to Link, his heirs, executors, administrators and assigns, immediately upon the determination of said term (p. 12, fol. 29).

The lease further provided that at the end of ten years after 1859, it being the end of the term of twelve years from the date of the lease, that it should be at the *election of Link either to purchase the buildings erected on said leased premises, at the appraised value at that time, or renew the lease of the said demised premises for the term of ten years longer*, and the value of the buildings, as well as the value of the rent of the said demised premises, to be appraised by three disinterested persons (p. 12, fol. 30).

The lease further provided that at the end of each and every ten years from May 1, 1859, during the term of ninety-nine years from the date of the lease *said Link* had the right to elect to purchase the building at appraisal, or renew the lease at appraised value of ground rent (p, 13, fol. 30–1).

The lease also provided that Sherman should have the privilege of extending the east wall six inches on the adjoining lot on the east, and if Link elected to build on the said adjoining lot he should have the privilege of using said wall by paying the appraised value of six inches thereof, as stipulated in the lease of June 1, 1849, by Elizabeth Garrett and A. S. Sherman, this being the lease prior to May 1, 1857 (p. 13, fol. 31).

On the 26th day of January, 1858, said Sherman gave a trust deed to E. S. Smith, to secure a debt he then owed Loeschigk Wessendorick & Co., merchants, in New York, for the sum of $7,692. Said deed conveyed all the right of Sherman in the lot of ground, (describing it) and other lots in Chicago, and also the three story brick building on the leased lot, stating Sherman's title in the lot to be a leasehold, for a term of years, and that the building belonged to Sherman, and he covenanting in the deed to pay the ground rent, and to keep the property insured for the benefit of the parties interested. The deed also conveyed all the right of Sherman, in law and equity, to the property, and all hereditaments and appurtenances thereto belonging, &c., and all rents, issues and profits, &c. The deed being the usual form to convey all rights and interests, with power to the trustee to sell in case default be made in payment of the debt secured (p. 13, 14, 15).

The deed was filed and recorded on the 25th day of February, 1858 (page 15).

Sherman failing to pay, the trustee made sale of the interest of Sherman in the lot, and also the building, July 15, 1861, and gave a deed to the plaintiff in error, one of the firm of L. W. & Co. This deed was recorded July 29, 1861 (pp. 17, 18, 19 and 20).

April 11, 1859, John Link assigned, for the benefit of creditors, to the defendant in error the said lease, with other property, conveying to said defendant, in trust, the lease and the rents to become due on said lease, but not the estate, from May 1st, then next. This

transfer was after the conveyance from Sherman, to secure L. W. & Co. and the recording of the deed (p. 29, fol. 66).

The assignment of Link to defendant in error, contained a power of attorney to collect all rents, and to do all things as fully and in as ample a manner as said Link could do, if the assignment had not been made (p. 32, fol. 72).

On the evening of May 1, 1862, a quarter's rent being due on that day, the defendant in error went to the building and demanded the rent. The building being closed, and no one there, he then declared the lease forfeited (p. 27, fol. 62).

May 2, 1862, the defendant served on Sherman a paper, giving notice that he had declared the term of said lease ended, for the reason default had been made in the payment of a quarter's rent—due May 1, 1862—$292,50 (p. 28, fol. 61).

May 24, 1862, the defendant demanded of E. S. Smith the keys to the store building, erected by Sherman on the lot, without any direct demand for the payment of rent; stating to said Smith, that he had declared the lease forfeited. The keys were given to the defendant, but to be without prejudice to the right of the plaintiff—and was then informed by E. S. Smith, that the keys had been left at his office, in his absence, by an unknown person. Said defendant took the keys, then took possession of the building, and rented it without authority from the plaintiff (p. 32, fol. 51, also, p. 27, fol. 62).

July 16, 1862, the plaintiff in error, by his agent and attorney, demanded of the defendant in error, in writing, that the property be appraised, as provided in the lease, upon the term being ended, &c. (pp. 23, 24, fol. 54, 55).

August 5, 1862, the suit was commenced, and on the 25th day of November, 1862, the cause was tried before his Honor, THOMAS DRUMMOND, and a jury; and a verdict for the defendant.

ASSIGNMENT OF ERRORS.

1. The court erred in overruling the objection made by the plaintiff below, to the defendant proving, under the issue, that there was rent due on the lease the 1st of May, 1862 (see p. 26, fol. 59).

2. The court erred in refusing to give to the jury instruction No. 1, asked by the counsel for the plaintiff in error.

3. The court erred in refusing to give to the jury instruction No, 2, asked by the counsel for plaintiff in error.

4. The court erred in refusing to give to the jury instruction No. 3, asked by counsel for the plaintiff in error.

5. The court erred in instructing the jury that the plaintiff below could not recover against the defendant, if the jury should find, from the evidence, that there was rent due upon the lease, on the first day of May, 1862.

6. The court erred in instructing the jury that it was competent for the lessor to declare the term of the lease ended, and to re-enter; and, in case of the determination of the lease in that way, prior to the time fixed, viz: May 1, 1860, then the lessee could not recover for the improvements, and the plaintiff was in no better position than Sherman—that the plaintiff could not recover against the defendant.

7. The court erred in its instructions to the jury, as to the legal construction of the lease and rights of plaintiff, after the forcible entry by defendant and taking possession of the building put upon the land by Sherman, and terminating the lease (see pp. 33, 34, fol. 75, 76).

POINTS OF PLAINTIFF IN ERROR.

I.

The defendant in error not holding the fee of the lot in question, but simply the right to the ground rent to become due upon the lease, he had no right to declare the term ended, and take the building and convert it to his own use, against the will of the plaintiff, who held the property therein, with notice to the defendant in error of his rights.

II.

If the defendant in error had the right to forfeit the lease and declare the term ended, and having done so, he was bound to treat with the plaintiff, the owner of the property in the building, the same as though the ten years had elapsed, and should have appraised and paid for the building, or given a renewal lease, or allowed the plaintiff to remove the building.

III.

The defendant in error is liable, in the action, to the plaintiff, for the damages he sustained by reason of the taking the building against the rights of the plaintiff and converting the same to his use.

ARGUMENT.

I.

MAY IT PLEASE THE COURT:

In presenting our views of the law applicable in this case, we may be permitted to remark in the commencement that, from the record, it would seem that the court below, as well as the defendant's counsel, treated the case as one in an action of covenant to enforce as against defendant Smith, the provisions of the lease upon the covenants on the part of Link as to the purchase of the building at the end of the term. It also appears from the record, that defendant Smith was treated by the court and counsel, as having the same rights, and being subject to the same protection that Link would have been, had he not assigned the lease, and he been the actor in the matter, instead of the assignee of the money rent to become due upon the lease for the use of the ground. We then took another view of the case, and do now consider that the law which, in an action of covenant, would have governed the case, has no direct application here, except as to the construction of the provisions of the lease, and the rights of the parties as they stood at the time of the suit.

To determine whether Smith, the defendant, had the right to take the property of the plaintiff, and not be liable to pay whatever damages his act caused, it will be necessary to first ascertain what, in fact, was his position at the time he took the property of the plaintiff; and for the better understanding of the terms and conditions of the lease, we will consider the following points:

1. What rights had Mr. Link, and his assigns, by the terms of the lease, in case of default in the payment of the rent.

2. What were the obligations and liabilities of Mr. Link under the lease.

3. What rights did Mr. Link transfer to the defendant by the assignment.

4. In what manner, and in whose name, could defendant Smith act under the assignment, by Link, to him.

As to the rights of Mr. Link, and his assignees, under the lease, we will say, that some of the covenants and agreements of Mr. Sherman with Mr. Link, do not extend to Link's assigns, and are only personal to him; therefore, when a lease contains benefits and also burdens on the part of both parties, and some do extend do the terms of the lease to the representatives and assigns, and some do not so extend by the terms thereof, then courts are obliged to construe the covenants in determining the true meaning of the parties as will give force and effect to the several covenants, as they are found in the deed.

It is evident that, in making the lease, the parties used the ordinary printed form of lease, for premises containing buildings, as some of the covenants cannot be applicable to the lease in question, without creating a contradiction, and conflict of covenants. See latter part of fol. 27, p. 11, the covenant that the premises were received in good condition, &c., and tenant to keep in good repair, &c. We will therefore speak of those covenants which can be considered, if the manifest intention of the parties were to be carried out.

In fol. 28, p. 11, of the record, it will be found that in case any part of the rent, reserved, behind, or unpaid, on the day of payment, or default be made in any of the covenants to be kept by Sherman, his executors, administrators or assigns, it shall and may be lawful for Link, his heirs, executors, administrators, agent, attorney, or assigns, *at his election*, to declare the term ended, and

re-enter, and the said premises again repossess and enjoy, *as in his first and former state.*

By this provision, it will be observed, that this right to re-enter and to declare the term ended for non-payment of rent at the time due, only gives the right to *repossess Link's first and former estate.* It does not, in the least, give the right to take anything but the land. We submit, if the court please, that this is an important consideration, and one which must, to a great extent, interpret and settle the rights of the parties in this controversy (p. 12, fol. 28).

The demise by Link conveyed to Sherman, his executors, administrators and assigns, the lot in question, for a term of years, *with the right to erect thereon a building.* The covenant to pay rent was by Sherman alone. The lease contained no covenant binding Sherman's representatives and assigns to pay the rent stipulated in the lease. Link, in making this lease, and taking a personal covenant from Sherman to pay the rent, would seem to be so specially provided for the purpose of making it a personal liability of Sherman, at all times and under all circumstances. This, to our mind, is the case; as we know at that time Mr. Sherman was a man of large pecuniary responsibility, and Mr. Link preferred to place the demise upon that express condition. Such being the case, and the assignment by Sherman *expressly providing that he would pay the rent*, and only providing for the transfer of the property without the burdens, notice of which came toLink and the defendant, it presented quite a dlfferent question, and the rights of the plaintiff became separate and in no way dependent upon the prompt payment of the rent by Sherman. The lease making such provisions, by its terms, the rights of creditors should be protected after taking property under it.

If Sherman had not parted with his property in the building, and had failed to pay the rent, then Link himself had no right to repossess himself of anything but the lot. No covenant or agreement whatever in the lease can be construed into giving to Link any

right or property in the building. Not even possession until the 1st of May, 1859. The words property and premises are used in the entire lease as referring to the lot, or to Link's first and former estate, as it is stated in the covenant, of right to re-enter and repossess. The building to be erected, in no part of the lease, is spoken of as the property in Link; it is distinctly stated to be the property of Sherman; and besides, there is not the least inference to be found in the lease where the building is, in any way, to be treated, when erected, as security to Link for the payment of rent. The provision, in fol. 29, as to the right to distrain for rent refers to such property of Sherman as he might have on the premises aside from the building.

2. As to the obligations and liabilities of Mr. Link, under the lease, we say that, he having demised and leased the property to Sherman, his executors, administrators and assigns, for a term of years, upon the condition that Sherman alone became bound to pay the rent, then upon his declaring the term ended for non-payment of rent, a personal covenant of Sherman to Link, and his assigns, they were bound to respect the rights acquired by the plaintiff, and to allow him to remove the building from the lot. The plaintiff, as assignee of Sherman and purchaser of the building, did not become liable, or subject, to the burden of paying the rent reserved, Link having made that a personal matter and liability, as before shown, on the part of Sherman alone, he could not interpose any objection to the right of the plaintiff. He was bound, after he had declared the term ended, to either make a new lease to the plaintiff at the appraised value, or to have purchased the building. Such we claim to be the obligations and liabilities of Link, under the lease; therefore, he could not have taken the building against the rights of the plaintiff.

We submit, if the court please, that the law is too well settled to require the citation of authorities to show that a lessor can not take buildings and fixtures, placed upon ground by the lessee by

express agreement that he may do so, and that the lessee has not the right to remove the buildings, whether it be at the end of the term, or on declaration of forfeiture by the lessor, at the expiration of the lease. Time is given by law for the removal of such fixtures, and any interposition on the part of the lessor, to prevent the removal, is, in law, a conversion and an injury resulting from the act of the lessor, for which he must respond in damages.

If we are correct in this position, then it follows that the defendant in error could do no more, even had he received the conveyance in fee of the lease, without a reversion in Link. But such was not the conveyance.

3. We will briefly consider what rights Link transferred to the defendant in error. In the statement of the case we referred to the assignment from Link to the defendant, and by referring to p. 28 and 29 of the record, it will be found that the transfer was simply the personalty in the lease, the rent to become due, not the title to the land from which the rent was to become payable; and besides, if the land had been assigned, it was simply in trust to pay debts, and Link would have had the reversion, so that the defendant could not have taken the right in the land in fee absolutely. which was necessary to give him the same rights that Link had, We think a correct reading of the assignment from Link to Smith, as respects this lease, is as follows:

" I, John Link, have assigned, transferred, and set over, and by " these presents do assign, transfer, and set over, to Solomon A. " Smith, all that certain lease made by and between myself and " Orrin Sherman, in and by which there is devised and leased to " Orrin Sherman all those certain premises situated, lying and " being in said city of Chicago, known and described as follows: " (describing it) from May 1, 1857, to May 1, 1869, at an annual " rent of $300 per annum for the first and second years, and $1,170 " per annum for the next ten years ensuing, payable quarterly, viz

" on the first days of August, November, February and May, " during said term, with the right in me, the said John Link, at " the expiration of ten years from May 1st, 1859, either to purchase " the building erected on said leased premises or renew the lease " of said demised premise for ten years longer, upon certain terms " in said lease specified, and also all rent to become due on the " same from and after May 1st, 1859. (Date April 11, 1859.)"

It is clear, that this transfer gives nothing but the right to the rents reserved, and the personal obligations of Sherman to pay the rent. It is the lease which is assigned, (not the property described in it), and the rent to become due. In the description of the lease the land is described, but for no purpose except to identify and convey the lease to Smith, to enable him to collect the rent promised to be paid by Sherman. The assignment is not executed as a conveyance of land, and can not be construed as conveying the estate.

4. As to the manner, and in whose name, defendant Smith could act under the lease, we say that it will be found on page 32, fol. 73, that Link gave to defendant Smith a power of attorney to do all things that he might do in his name, or in the name of said defendant; under this power the defendant could not terminate the lease, except in the name of Link, and as his agent or attorney, and to execute whatever notices and papers necessary, in his, Link's, name.

This power does not enlarge the authority of the defendant, except as agent or attorney of Link, nor does it give him any greater rights or title to the lot in question. It may, and no doubt it does, give the defendant authority, as the attorney of Link, to act for him, and in his name, as he might see fit, but in no way can the power be construed to give the defendant the right to act in his own name, and as he could do, had the property described in the lease been conveyed to him in fee simple, with all the rights and interests of Link. without reversion.

If the property had been conveyed in fee to the defendant, and he had accepted the conveyance, and had taken the buildings, then he would have become liable to all the burdens of the lease which Link was liable to, as to the purchase of the building and reletting the ground, because of his act in taking the property. Although that covenant being personal to Link, the defendant could not assume and claim the benefits, and take the building, without being liable for the burdens imposed and for his unlawful act. It would be sustaining a monstrous fraud to allow the defendant to possess himself with such a valuable piece of property and not be liable to the plaintiff for the consequences of his acts.

We submit, if the court please, that after considering all the rights, and the benefits and burdens, in the lease, as therein covenanted, it revolves itself back to the question: Does the lease provide, under any state of the case, or position of the parties, and for any cause, that Link or any one, may at any time take the property in the building without paying for it? We answer that it does not, in any way or manner, so provide, nor does the lease in any one sentence so intimate. How, then, can counsel justify the high handed act of the defendant in forcibly taking and holding the building? In fact, the defendant, as shown by the record, has nothing whatever to do with the lot. Link has not conveyed to the defendant any right to the possession of the lot; such is the fact to this day; and, as the record shows, the defendant is a usurper and a raider upon the rights of the plaintiff. The right to take the rent from Sherman, upon the lease, or to sue him upon his promises, does not give the defendant the right to the possession of the lot, nor of the building. Since 1862, the rents of the building and ground would bring at least three thousand dollars a year, while in '61 and '62 the rent would not have been worth one thousand dollars a year. The value of the building to-day is at least ten thousand dollars, and in 1862, as shown by the proof, the value did not exceed five thousand dollars. This case is one of peculiar hardship, and it is shown in the record that the plaintiff was willing to allow the rents to be deducted from the then low value of the

building, and take the balance, but the defendant would not consent. Such was one of the instructions asked of the court and refused.

Counsel may claim that the defendant is not liable, upon the covenant of Link, to purchase the building, because that covenant was personal only to Mr. Link, and that it did not run with the land. We do not claim that he is liable in an action of covenant. We have before stated that the defendant had not the right to declare the lease ended, to the effect, as to release and absolve the lessor from the liability, upon the covenant, to purchase and re-let the ground, as he had not the estate, but simply the personalty; that he had no right whatever to interfere with the buildings. The question as to whether that covenant runs with the land or not can not make any difference here. We admit, for the purpose of this argument, that the covenant to purchase and renew the lease did not run with the land, and if it did, the defendant has no such conveyance as to make him liable in an action of covenant. We are not attempting to sustain an action of covenant on the lease. The doctrine in the Spencers' case only applies to cases in an action of covenant upon the lease, and whether the covenants in this case do or do not run with the land, the authorities can not, in any manner, be considered as applying, in this action, to the liability of the defendant. So it is with the case of *Van Ranselear's heirs* v. *Penniman*, 6 Wend., 581, which counsel cites. The authority applies to an action of covenant on the lease, where the covenants run with the land, and the rights claimed in damages are given by the covenants, and not for damages occasioned without authority of law or rights under the covenants. As there is no right in the defendant under the assignment of the lease, nor in the lease to Link, to take the building, we consider the case a plain one. As remarked by Ch. J. CATON, the questions are so plain that they decide themselves.

We will refer to a few cases giving general principles which apply to constructions of covenants in instruments of this kind.

In the case of *Betts* v. *Turner*, 1 Johns. Cases, 65, it was held that where the sense of the parties to a covenant is unequivocally expressed a strict and absolute performance is required.

In the case of *Quuckenboss* v. *Lansing*, 6 J. R., 49, it was held, that covenants should be construed according to the spirit and intent of the parties.

In the cas of *Cole* v. *Howes*, 2 Johns. Cases, 203, it was held that' where there are several covenants in an instrument they are to be taken together.

In the case of *Kent* v. *Welch*, 7 Johns. R., 258, it was held that, all implied and doubtful covenants will be restrained and interpreted by the express covenants in the deed.

In the case of *Stuyvesant* v. *Davis*, 9 Paige, 427, it was held that, when the lease contains a clause that the lessor may re-enter the lease is not forfeited by the non-payment of rent. It is only made voidable at his election.

In the case of *Beach* v. *Nixon*, 9 N, Y., 35 (5 Selden), it was held that the estate continued after the breach, unless the landlord exercised his election.

Applying these principles of law, we say it is clear, from the covenant, as to re-entering after the term ended, and the covenant as to delivering up possession (they being express covenants, and free from ambiguity), that those covenants should govern and control the other covenants in the lease, so far as to determine the intention of the parties to the demise respecting the buildings, which it was expected and understood, Mr. Sherman would place upon the lot.

These covenants positively and unquestionably define the estate to be repossessed, and to be delivered up by Sherman to be *Link's first and former estate.* Not the estate as it might be after the

building had been erected thereon by Sherman and for his benefit.

The cases cited in the 9th Paige and the 9th N. Y. (5 Selden), and the cases there cited, fully show that the term of the estate could not be ended by the non-payment of rent; that it is necessary for the party, who has the right, to elect to exercise that right, and in a positive and unequivocal manner. A demise for years can not be terminated on slight causes, nor in a loose, unmeaning manner, and especially by a stranger, nor by a party who has not the right to receive the estate from the lessee.

We submit, if the court please, that the defendant had no right to declare the term ended, that right being in Link; then, we say, he is liable for damages. The power of attorney did not give him the right to do so in his name. If he had acted for Link he must have done so in Link's name, so that he would be liable for defendant's acts. Link having the right, alone, and not exercising it, the estate in Sherman's grantee is perfect to this day, subject only to be forfeited by the election of Link, and the exercise of that right by him.

The notice must have been given by Link, and in his name, as he alone, at that time, could receive possession. Notice can not be given by an agent in his own name, as the defendant did in this case, unless the agent has the power and the authority to let the premises as well as receive the surrender.

The defendant only had power to receive the rent, and had no power to let or receive possession of the premises demised; *that is, Link's first and former estate.*

The qualification in the express covenant, of the meaning of the words premises and property, must govern and be considered the meaning of those words throughout the lease, viz: *Link's first and former estate.*

Taylor's Landlord and Tenant, 337.

The covenants to surrender are to Link, and no one; not holding the reversion, has any right to take possession (*Ibid.*, 357). The defendant had no immediate estate in reversion or remainder, and had no claim or power over the lot. Sherman could not have surrendered to the defendant, if he had been disposed to do so, as he had no higher estate (p. 358). As to these points the law is well settled.

Witness Gay (p. 27) says the defendant demanded the rent, a few moments before sundown, of a closed building, and not getting the rent, declared the lease forfeited; that on the next day he gave Mr. Sherman notice (p. 28).

This notice simply informed Mr. Sherman that he had elected, and did thereby give notice of his election, under the terms, &c., of the lease made, &c. We submit that, this notice does not contain a declaration of forfeiture of the lease by Link—not even by the defendant.

It simply notifies Sherman that he, Smith, trustee and assignee of Link, had elected to declare the term ended, but failed to state that he had done so. Having elected, without carrying it into effect, is not terminating the lease. The defendant had no power, as the trustee and assignee of Link, to do any such thing, and the act is wholly farcical and of no force and effect whatever.

The defendant made no demand of Sherman for rent, nor for the premises in his writen notice, and how could he tel lwhat the defendant intended by the notice? It may be, he feared that, if he informed Sherman of his intentions itwould have defeated his efforts to get the property.

Notice to surrender, on declaring the term ended, must be given to the immediate tenant, or his assignee, and must state all that is demanded and required, fully and clearly, so the tenant will understand what is claimed. This was not done; and we submit, if the

court please, that there has been no forfeiture of the lease to this day, according to law, and the term is not yet ended by the exercise of the right to elect to put an end to the term, as provided in the lease; therefore, the defendant is liable for the property, having usurped it without any right. He might, with as much justification, have taken the buildiug at any time, as the lease does not, nor does the law, give any such authority whatever under any state of facts. It is one of the most unaccountable things known to any construction of covenants.

II.

We come now to consider our second point; and, as we think, have fully shown that the defendant had no right, or authority, to declare the term ended, we will take but a short time in presenting our views upon the question made in the scond point.

We have stated, as a proposition, that if the right to forfeit the lease and declare the term ended forever, and to repossess and enjoy the premises, as in Link's first and former estate, had been assigned to the defendant, then the defendant was bound to elect whether he would pay the plaintiff the value of the building or offer him a lease at the appraisal of the value of the rent. We need not take time further to show that the defendant could not take the property in the building upon putting an end to the term, as that has been, in our judgment, fully demonstrated. We will try and show that the declaration, or election, to end the term, which the defendant claims he made, was simply placing himself where he would have been on the Ist day of May, 1869, with all the rent paid by Sherman. By the defendant's act of forfeiture, and election to end the term, if he had the power, the lease then no longer existed in force, and the rights of the assignee of Sherman of the property not being liable to pay the rents, it was the right of the plaintiff to have his property, or have a lease of the

ground at the appraisal of three disinterested men. It is wicked, we think, to say that the plaintiff must lose the use of his property for seven years, and perhaps forever, because the defendant had put an end to the term. Is it not the proper construction of this covenant to say that this right in Link, or the defendant, to declare the term ended for non-payment of rent, was to protect the lessor, and enable him to compel some one to pay the ground rent, which was all Link could take, or to give up the lot. In other words, to take off the building, so that Link could let the lot to some party who would pay the rent.

To give the parties any greater power under the lease, would be adopting a rule that, if a debtor did not pay a debt of five dollars the creditor should have the right to take property to five times the amount, without a process of law, or without any authority but the force of will of the creditor. It may be said by counsel that the action is prematurely brought, for the reason the appraisal, by the terms of the lease, was not to be made till May 1, 1869, and every ten years thereafter. While we admit that such are the conditions of the lease, by its terms, we do not admit that the action is prematurely brought. The right of action in this case, as to time, does not depend upon the lease. We before alluded to the fact that the record showed that counsel, as well as the court below, seemed to place the right to recover, if at all, upon the terms of the lease, which would have been correct if the action had been on the covenants. The right to recover on this action is, as we think, clear, from the wrong act of the defendant. From the right which the act of the defendant gave the plaintiff, to recover his damages which he sustained by reason of the unlawful interference with the property of the plaintiff. The right to have and recover the damages which were the direct consequences flowing from the action of the defendant, which we claim to have fully shown to be unlawful and without even color of right.

It may be said by counsel that a lessor is only liable to pay for the value of the buildings at the time specified in the lease, viz:

at the end of the term, and not at the time he puts an end to the lease, under a covenant that he may do so on certain conditions. We should not dispute such a rule, in certain cases, in an action of covenant upon the lease, but we do most certainly claim that the case under consideration is not such a case as counsel claims the books to make against us. We can not see, from principle, why a party can not make himself liable upon an action on the case for damages, growing out of a wrong act committed upon matters connected with a lease, or any writing, as well as upon any other matter. If the defendant had no right to take building, or prevent a removal, then why should he be protected against an action for seven years, any more than he should be had he taken the plaintiff's horse after stipulating that he might have access to his barn for ten years.

The right to terminate the lease seven years before the time, by its terms, arrived, for the non-payment of rent, can not in the least give the right to take the property of the plaintiff, nor would it have given him the right to take the property if Sherman had not made sale of it, and had forfeited the lease, for the reason no right to take the building, in any case, except upon payment of appraised value.

In this point rests the whole question, in our judgment, and the fact of the lease not giving the right to re-enter and repossess anything *but the first and former estate*, which is the lot of ground, and nothing more, we say that the defendant is, in fact, without one particle of law or justice to sustain his position.

Counsel may say that this case is like unto the cases in the books when the estate for years determines by the voluntary act of the tenant, as if he committs a forfeiture, and deprives himself of the right to emblements, for the reason that improvements are not more favored in the law.

We submit, if the court please, that there is a very great difference between the right of the tenant to emblements after the for-

feiture, and the right to buildings placed upon a piece of ground after the making of the lease, with direct and positive covenants as to the property in the building, under all circumstances, and where the covenant as to forfeiture for non-payment of rent, the stipulation not giving the lessor any right to the building, and limits the retaking possession to the first and former estate. There is a very good reason why a tenant for years, upon forfeiture, can not take crops in the ground, put there by himself, and then commit a breach of his covenants. But it is not so with buildings put upon the land by the tenant, for his own use, under the conditions and covenants in the lease, for the reason such buildings are the exclusive property of the tenant, and no case can be found where it has been held that the tenant could not take such buildings off the land, after the termination of the lease, except cases where the tenant abandoned the premises, leaving the buildings and fixtures remaining, and in such cases the rule applied for the very reason of the abandonment being evidence that it was agreed that the improvements should be the property of the landlord after the term had ended.

The question as to the right of the defendant to take the building of the plaintiff, after the term had expired by limitation, or by forfeiture by the tenant, must depend upon the same rule of law. It seems to us to be so clear that we do not deem it necessary to refer to authorities. We will, however, consider the law in this country as to the right of the tenant to remove buildings and fixtures placed upon the demised premises by himself, in cases where the lease is silent as to such fixtures.

The rigor of the common law has been very greatly relaxed, both in this country and in England, and courts of law have adopted the principle that it is for the benefit of the public to encourage tenants to make improvements in trade, and to do what is advantageous for the estate during the term, with the certainty of their still being benefited by it at the end of the term. We hold that the rule is the same, and that it applies whether the tenancy be

for years or at will. It matters not whether the building is erected upon blocks or upon stone masonry; whether of wood, stone or brick. It is the property of the tenant, and he has the right to remove it at the end of the term, and the landlord can not interfere unless the tenant damages the freehold. The rule is founded upon the highest principle of justice and right, and in this country, without such principles of law, we would see less improvements.

This general principle has been applied in a case where vats had been put up for the convenience of the trade of the tenant; also, in a case of a mill and furnace, steam engines, copper stills, erected to carry on distilling, though fixed to the building; also, in a case where a building had been erected on the demised premises for the purposes of trade, and placed upon a foundation of brick masonry in the ground; also, in a case where a building had been erected upon stone posts set in the ground. Many other cases, equally decisive of the question, can be found in the books.

Taylor's Landlord and Tenant, sec. 545.
Beck v. *Rebow*, 1 P. William Rep., 94.
Lawton v. *Lawton*, 3 Atk. Rep., 13.
Poole's case, 1 Salk. Rep., 368.
Union Bank v. *Emerson*, 15 Mass. Rep., 159.
Taffle v. *Warwick*, 3 Blackf., 111.
Holmes v. *Tremper*, 20 John. Rep., 29.
Cook v. *Champlain T. Co.*, 1 Denio Rep., 92.
Swift v. *Thompson*, 9 Conn. Rep., 63.
Reynolds v. *Shuler*, 5 Cowen Rep., 323.
Hermann v. *Vernop*, 6 John. Rep., 5.
Taylor v. *Townsend*, 8 Mass. Rep., 416.
Ombony v. *Jones*, 19 New York, 234.

In the case of *Van Ness* v. *Packard*, 2 Peters Rep., 137, is a case also in point, and from an examination of the opinion of Judge Story, it will be found to be satisfactory to any mind of correct ideas of law and justice.

The learned counsel says that the authorities sustain the instruction of the court, which is as follows:

"If the lessee did not pay the rent according to the terms of "the lease, it wss competent for the lessor to declare the term end- "ed and re-enter, and in case of a determination of the lease, "in that way, prior to the time fixed (viz: May 1, 1869) no pro- "vision seemed to be made by the lease for the payment, by "the lessor, of any improvements made by the lessee upon the "land, and in the case supposed, in the absence of such provision, "the lessee could not recover for the improvements, and the plain- "tiff can be in no better position than Sherman, consequently, if "the jury believe, from the evidence, that on the 1st day of May, "1862, there was (according to the terms of the lease) rent due "and in arrear, unpaid after demand for the payment thereof, and "the lessor, or his assignee, exercise the option given by the lease, "and declared the term ended, and re-entered and took possession "of the premises, of which the lessee and his assignee had due no- "tice, then the plaintiff can not recover against the defendant in "this action the value of the improvements pnt upon the land by "Sherman or his assignee."

If the court please, we say that the instruction, so far as it relates to the right of the lessor to elect to put an end of the term for the non-payment of rent, we will not take time to consider now; in fact, we may admit that he had the right, and upon no other notice than a publication, *viva voce*, in the street in front of the building, about the setting of the sun, as stated by witness Gay (see p. 27). The instruction clearly informed the jury that the assignee of Link had the same right to elect, which we think very doubtful, to say the least of it. But as we are now discussing the point as to the right of property, in case the assignee had that right, we will make no point upon that part of the instruction at this time.

It is distinctly stated in the instruction that, as there seemed to be no provision in the lease for the payment of the value of the buildings in case the term of the lease should be determined prior

to the time fixed. then Sherman could not recover, and the plaintiff had no greater rights and could not recover in this action. We can not find any authorities to sustain, or, in the least, support this view of the law taken by the court, except in cases of an action of covenant brought upon the lease. If we had sued upon the lease, claiming the liability of the defendant to be upon the covenant in the lease, then of course we could not recover, except upon the terms of the lease. But we do not claim to have the right to recover upon the covenant to pay or re-let the ground, as in an action of covenant; but because the lease does not give the lessor, nor the defendant, any right whatever to the property, and because the defendant disregarded all rights, and the plainest justice, in taking and assuming to hold the property of the plaintiff without law or reason.

We submit, if the court please, as a matter of law, that under the lease in question, when the defendant assumed to exercise the right to terminate the term of the demise, for the non-compliance of a personal covenant of the lessee, as to the payment of the rent reserved, after the defendant had notice of the transfer and sale of the property by Sherman, it became necessary for the defendant to give the plaintiff notice immediately upon his election and declaration of forfeiture of the lease, and of his intention to re-enter and take possession of the lot.

The court, in its instruction to the jury, said: "Of which the "lessee and his assignee had due notice, then the plaintiff could "not recover against the defendant in this action the value of the "improvements put upon the land by Sherman or his assignee." There is no proof in the record that the assignee of Sherman had due notice, that is, notice on the 1st day of May, 1862, of the demand of Mr. Sherman, and the notice to him on the next day, as stated by witness Gay (p. 27).

The defendant had notice of the transfer by Sherman, dated January 26, 1858, to the trustee for L. W. & Co., and of the sale on the trust July 15, 1861, said transfers having been put upon

record—the first of which several months prior to the assignment by Link to the defendant. If it was necessary for the defendant to show due notice to the plaintiff, as the court gave the jury to understand it was, then, we submit, that it was error for the court to charge the jury to that effect, as there was no proof, on the trial, of such notice. But the great error in the instruction of the court consisted in the charge to the jury, *that in the absence of such a provision* (referring to the fact that the lease did provide for payment of improvements in case the lease was ended by act of the lessor for non-payment of rent) *the lessee could not recover for the improvements, and the plaintiff could not be in any better position than Sherman* (p. 34).

This instruction, in effect, advised the jury that in case default was made by Sherman, in the payment of rent when it became due, the defendant had the right, not only to put an end to the lease and to take possession of the property, and to enjoy it as in Link's first and former estate, but to take the buildings placed upon the lot by Sherman, after the date of the lease, and have and hold said building until May 1, 1869, against the plaintiff. This, we submit, is the true meaning of the instruction, and must have been so understood by the jury, which, we think, is error.

The agreement between the parties, Link and Sherman, that Link should have the right to elect to purchase the buildings erected on said leased premises, at the appraised value, on the 1st day of May, 1869, or renew the lease for ten years, we admit, is a personal one between Link and Sherman, and it stands independent of any act as to time in which the declaration of forfeiture might be made, for the non-performance of the covenant as to the payment of rent. If that period had arrived, and Link had refused to elect, no doubt a court of equity would have compelled him to renew the lease, that obligation being implied in the agreement, although there is not any agreement to that effect in terms. It is evident that there is no agreement binding Link to purchase the property; it is simply an agreement giving him the privilege;

therefore, we say the whole question must be determined in this case upon the right of property in the building, and the right to the possession of the building, the moment the lease became ended by the declaration of the defendant.

It would be very strange doctrine indeed if it should be contended that the defendant has the right to take the property without paying for it, in the absence of any authority in the lease to do so. If the defendant preferred to re-enter in the name of Link, or to take possession of the property under the covenant, instead of trusting to the chances to collect the rent, then, if he done so, he most certainly was obliged to let the owner take off the buildings, and leave the property as in its former estate, so that the defendant could enjoy it as in Link's first and former estate, that being all the lease could give.

Counsel may say that the defendant, as assignee of Link, and a faithful trustee, could do no less than take possession of the buildings, as well as the land demised and leased, for the non-payment of ground rent. We think the defendant was not compelled to do a wrong because he was a trustee, and held certain securities for the payment of a debt. He certainly had the right to secure the payment of the rent in the mode pointed out in the lease, or by action. But we can find nothing to justify him in taking the property of the plaintiff without right or authority of law. A faithful performance of a duty as a trustee did not require the defendant to take property in which neither he or his assignor had any claim or right.

It may be said by counsel for defendant in error that the plaintiff sought to avoid a burdensome lease, and that notwithstanding such effort, the plaintiff demanded of the defendant an appraisement of the building, as if he had kept the covenants in the lease and that such appraisal be taken years before the time fixed in the lease for such appraisment. If we understand the record, there is no proof to show that the plaintiff ever became bound upon the lease, or any way in to perform the burdens therein, and could not have

sought to get rid of burdens which did not rest upon him. The plaintiff did request the defendant in writing, in July, 1862, some time after he had taken focible possession of the building, and otherwise disragarding his rights, that an appraisal be had, the value ascertained and payment thereof respectfully requested. We cannot see in this request any very great objection or compromise of the plaintiff's rights. It certainly notified the defendant that the plaintiff had rights and claimed the property. No doubt it was a wise notification, for the reason that, it was difficult for any one to determine what the defendant did not intend to do. It was known what he had done, and no authority whatever could be found for it; and it may have been supposed that he was waiting for an opportunity to appraise the property and pay for it; such a supposition, in our judgment, would have been more clearly allied with justice and reason, than the taking of property to which he had no right, or claim upon, to a supposition that he desired to avoid a burden. But, we will not take more time upon this immaterial supposition, and will simply say, that the testimony does show that the attorney of the plaintiff did offer, on the part of the plaintiff, every thing fair, and more than liberal. On p. 23, fol. 53, it appears that witness Smith did offer to take a lease for the plaintiff at a fair price; or, that he would take much less than the building was worth, and convey to him all the plaiutiff's rights. We think the record shows that the plaintiff, in this matter, offered every thing reasonable and in fact liberal; and, if we undorstand the record, it appears quite full to show that the defendant considered that he had got a good thing into his hands, by the non-payment of rent by Sherman, and intended to hold it.

We submit, if the court please, that we have shown that, if the defendant had the right, as the assignee or attorney of Link, to declare the lease ended, then he occupied the same possition as to liability that Link would have done, had he terminated the lease; and that such declaration had the same effect as to the right of property in the plaintiff as the expiration of the time limited would have had; and in such case, the defendant was obliged to recognize the

property in the buildings, in the plaintiff, and was bound to pay the value of the property, or offer another lease to the plaintiff, or allow him to remove the building from the lot; and that, in case of refusal or neglect to do these things, and instead thereof, he took possession of the building, against the request and rights of the plaintiff, and thereby he became liable to pay the plaintiff the value of his property.

III.

In presenting our views upon this point, we do not deem it necessary to take much time, for the reason, that no question was made in the court below as to the form of theaction.

It seemed to be admitted that if the covenants in the lease did not protect the defendant, then the right to recover had been shown in the plaintiff. The declaration charged the defendant with committing a wrong against the plaintiff, in taking his property into his possession, and appropriating it to his use, against the rights of the plaintiff. The wrong consisted in the act disregarding the rights of the plaintiff, in several particulars, the consequenses of which, damaged the plaintiff to the value of the property. The defendant interposed a plea of not guilty, and it being shown, by the proofs, that he had exercised acts over the property of the plaintiff, and had set his rights at defiance, the defendant rested his justification upon the covenants in lease, claiming the right to control the property, and have, and receive the benefits thereof. It is the consequences of these acts, and the damages caused thereby, which gives this form of action; and the measure of such damages must be the highest value of the building, at any time between the time the acts were committed and the commencement of the suit.

Assuming, as we do, that the defendant, by the covenants in the lease, in putting an end to the term of the demise, had no right to do any act except such as the lease, by its direct terms, authorized

him to do, all acts committed by him, not clearly within the lease and authorized thereby, were usurpations and injuries to the plaintiff, which the law would immediately redress at the suit of the plaintiff.

The record fully showing that the defendant had no authority from the lease, to take the property of the plaintiff in the buildings upon the lot, and that he had done so, and refused to recognize the plaintiff's rights, the instructions asked by the counsel for the plaintiff ought to have been given by the court to the jury.

The first instruction asked by the counsel for the plaintiff was, that "the drfendant had no right to take the building upon declar-" ing the lease ended, without paying the plaintiff the value there-" of.

It is very manifest, from the record, that this instruction ought to have been given to the jury. It is a plain proposition of law, which follows direct from the proof, and should have been given as asked, because there was not a particle of proof to the contrary of this conclusion. The lease authorized the asignee to declare the term ended for the non-payment of rent. But did not authorize the defendant to take the building; so we say that, the law was positive in its force against the act of taking the property of the plaintiff. The instruction assumed the right in the defendant, from the proofs, to declare the term ended, and asked only at the hands of the court to declare the law as providing the right of the defendant to take the buildings. This was refused and we say it is error.

We think the second and third instruction asked by the plaintiff's counsel, ought to have been given to the jury as law, by the court p. 33, fol. 75.

The third instruction seems to us to present a clear principle of the law and very liberal justice. It simply asked the court to in-

struct the jury to allow the value of the buildings, after deducting all the rents due on the lease, and that, only in case the jury believe from the evidence, that the defendant took possession of the building against the plaintiff.

We submit if the court please, that there is errors in the record and proceedings as claimed by the plaintiff in error, therefore, the judgment ought to be reversed.

Chicago, Nov. 28th, 1864.

E. S. SMITH,

Attorneg for Plaintiff in Error.

IN THE

United States Supreme Court,

DECEMBER TERM, 1864—No. 99.

GUSTAVUS KUTTER,

Plaintiff in Error,

vs.

SOLOMON A. SMITH,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR PLAINTIFF IN ERROR.

CHICAGO:
BEACH & BARNARD, PRINTERS, 14 S. CLARK ST., CHICAGO.

1864.

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1863.

No. 214.

GUSTAVUS KUTTER,

Plaintiff in Error

vs.

SOLOMON A. SMITH,

Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

S. W. FULLER, *for Defendant in Error.*

CHICAGO:

BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK STREET.

BRIEF AND ARGUMENT.

On the first day of May, 1857, John Link, by a lease of that date, demised to Oren Sherman a certain lot of land in the city of Chicago, described as the east 19½ feet of the W ½ W ½ of lot 7, block 21, in the original town of Chicago, for twelve years from that date, at an annual rent of $300 for the first two years, and $1,170 for the last ten years; in addition, the lessee covenanted to pay all the taxes and assessments levied on the premises during the term.

It was provided in the lease that, in case of a failure by the lessee to pay the rent when due, or to keep any other covenants contained therein, that the lessor, his heirs, agent, attorney or assigns, should have the right to enter into the demised premises, with or without process of law, and expel the lessee or any persons occupying the premises, and hold the premises as at first; and the lessee further covenanted that, if the term should at any time at the election of the lessor, or his assigns, be ended, he, and all those occupying the premises under him, would immediately and peaceably surrender the possession of the premises to the lessor, or his assigns.

The lease also contained the following covenants and agreements:

"And it is further agreed upon, by and between the parties, that "at the expiration of ten years from the first day of May, one "thousand eight hundred and fifty-nine, that it shall be at the elec-

" tion of the said first party either to purchase the buildings erected " on said leased premises at the appraised value at that time, or " renew the lease of the said demised premises for the term of ten " years longer, and the value of the buildings as well as the value " of the rent of the said demised premises, to be appraised by three " disinterested persons—one to be chosen by the party of the first " part, one by the party of the second part—and the two appraisers " thus chosen are to choose the third person, and the majority are " to decide the value of the buildings, as well as the value of the " rent of the above mentioned premises, as the case may be. And " it is further agreed upon, by and between the parties, that at the " expiration of each and every ten years from May first, one thou- " sand eight hundred and sixty-nine, for and during the term of " ninety-nine years from the date of this indenture, that the party " of the first part is either to renew the lease or purchase the build- " ings as above stipulated.

" And it is further understood and agreed upon, by and between " the parties, that the said second party shall have the privilege of " extending the east wall of the above mentioned buildings six (6) " inches on the adjoining lot on the east. And if the said party of " the first part elects to build on the said adjoining lot, he shall " have the privilege of using said wall, by paying the said second " party the appraised value of six (6) inches of said wall, built upon " said six (6) inches on said adjoining lot, as stipulated in lease, " dated June first, one thousand eight hundred and forty-nine, exe- " cuted by Eliza Garrett, executrix, and James Crow and Thomas " G. Crow, executors of the estate of Augustus Garrett, deceased, " to A. S. Sherman. And it is further understood and agreed " upon, that the said first party is to give notice in writing to the " said second party, if he elects to purchase said buildings above " mentioned, sixty (60) days previous to said purchase."

(Record, pages 10, 11, 12 & 13.)

On the 26th day of January, 1858, Sherman executed and delivered to E. S. Smith, as trustee, for some of his creditors in the city of New York, a trust deed, to secure

his indebtedness to said creditor, which conveyed for that purpose the premises leased by him of Link. It was recited in that deed, that Sherman's interest in the demised premises was a term for years, which would expire May 1, 1869, with certain rights as to the renewal; and that the three story building standing on the premises was the property of Sherman.

The lease from Link was transferred to Smith, in trust, and Sherman agreed that he would pay the rent due on the lease, and keep the property insured for the benefit of his creditors, until their debts were paid.

This trust deed contained usual and full powers of sale. (Record, pages 13, 14. 15 & 16.)

Sherman having failed to pay the debts secured by that trust deed, Smith. as trustee, advertised the premises described in it for sale; and on the 15th day of July, 1861, as such trustee, sold all of Sherman's interest in the demised premises, and in "the three story brick store building "standing thereon," to the plaintiff, Gustavus Kutter, for $1,000, and executed and delivered to him the usual trustee's deed therefor. (Record, pages 17, 18 & 19.)

On the 11th day of April, 1859, John Link assigned his interest in the lease to Sherman, to the defendant in error, Solomon A. Smith, as trustee for Walter Laflin, of Mass., to whom he was largely indebted, for the purpose of securing that indebtedness; and by the instrument of assignment he made and appointed Smith his (Link's) attorney, irrevocable, to collect the rent which should accrue on said lease (as well as on many others assigned to him for the same purpose, at the same time), and to do all things in regard to said leases, and the rents secured thereby, which Link might do in person if that assignment had not been made. (Record, pages 28 to 33.)

On the 1st day of May, 1862, Smith, as assignee of Link, went upon the premises demised to Sherman, and demanded the rent due that day on the lease to Sherman, which was not paid, and the next day Smith gave to Sherman notice that he had elected to forfeit the lease for non-payment of rent, due May 1, 1862. (Record, pages 27 & 28, testimony of James E. Gay.)

(Sherman himself testified, that not only was the rents falling due that day, not paid, but there "was a year or two's "rent then due, and which remained unpaid." Record, page 26.)

This forfeiture of the lease occurred in May following plaintiff's purchase of Sherman's interest in the lease, which was in July, 1861; and the defendant, immediately after the declaration and notice of forfeiture, called on E. S. Smith (plaintiff's agent) for the keys to the brick store on the demised premises, which were delivered to him by E. S. Smith, as appears from the testimony of Almy, page 22, and E. S, Smith, page 23 of Record.

In July, 1862, the plaintiff, by his agent, E. S. Smith, notified the defendant that, because of the forfeiture of the lease from Link to Sherman, for non-payment of rent, he (the plaintiff) was entitled to have the brick building on the demised premises appraised under the terms of the lease, and the value of it paid to him. This notice was served on the defendant July 22, 1862, and he refused to comply with it, and on the 5th day of August, 1862, this suit was commenced.

It is an action on the case. The declaration sets out the making of the lease by Link to Sherman; the execution of the trust deed by the latter to E. S. Smith, as trustee; the sale by the latter to the plaintiff, in July, 1861; the assignment by Link to defendant, S. A. Smith, of Sherman's

lease, as security for certain debts of Sherman's; and that the defendant had declared the lease forfeited, and taken possession of the demised premises, and refused to join the plaintiff in having an appraisement of the building standing on said premises, and also neglected and refused to pay plaintiff the value of that building; whereby he became liable to plaintiff for its value, and this action was brought to recover it. (Record, pages 3, 4 & 5.)

There was a trial by a jury, and a verdict and judgment for the defendant, and the plaintiff, Kutter, brought this writ of error to reverse that judgment, for error in giving and refusing the instructions set out in pages 33 & 34 of the Record.

"1st. The plaintiff asks the court to instruct the jury that the "defendant had no right to take the building upon declaring the "lease ended, without paying the plaintiff the value thereof.

"2d. The plaintiff asks the court to instruct the jury that the "defendant, on refusing to appraise the property and pay the plain- "tiff the value thereof, after he had taken possession thereof, be- "came liable to pay the plaintiff the value of the property at the "time of his taking possession thereof.

"3d. That if the jury believe, from the evidence, that the de- "fendant took possession of the building against the plaintiff, and "terminated the lease, then the defendant would be liable to pay "the plaintiff the value of the building at the time, after deducting "the ground rent due at the time of taking possession.

"All of which instructions the court refused to give, as requested "by plaintiff's counsel, and to which refusal the plaintiff then and "there excepted.

"The court instructed the jury, *inter alia*, as follows: By the "terms of the lease from Link to Sherman, it seemed to be contem- "plated that the lessee should have power to put improvements "upon the land which might remain there on the 1st of May, 1869, "('ten years from the 1st day of May, 1859'), and it was by the

" terms of the lease then left optional with the lessor to purchase " the buildings erected on the land at the appraised value, or renew " the lease for ten years longer; but up to that time, that is to say, " till May, 1869, the clause of forfeiture for the non-payment of " rent was nevertheless in force and binding on the lessee, and not- " withstanding improvements may have been in the mean time put " upon the land, if the lessee did not pay the rent according to the " terms of the lease, it was competent for the leasor to declare ' the " ' term' ended, and to re-enter, and in case of a determination of " the lease in that way prior to the time fixed (viz. May 1st, 1869), " no provision seemed to be made by the lease for the payment by " the leasor of any improvements put by the leasee upon the land, " and in the case supposed, in the absence of such provision, the " leasee could not recover for the improvements; and the plaintiff " can be in no better position than Sherman. Consequently, if the " jury believe, from the evidence, that on the 1st day of May, 1862, " there was (according to the terms of the lease) rent due and in " arrear, unpaid, after demand made for the payment thereof, and " the leasor or his assigns exercised the option given by the lease, " and declared ' the term' ended, and re-entered and took possession " of the premises, of which the leasee and his assignee had due " notice, then the plaintiff cannot recover against the defendant in " this action the value of the improvements put upon the land by " Sherman or his assignee."

It is apparent that the rights of the parties depend upon the terms of the lease from Link to Sherman. The parties to the suit, are, respectively, the assignees of the lessor and lessee, and certainly have no greater rights than they.

By the lease, a term of twelve years was granted to Sherman, but liable to be forfeited if he failed to pay the rent, or to keep any other covenant on his part to be performed. He die not pay the rent when due, but allowed it to accumulate for one or two years without payment, and the defendant, as assignee of Link, and a faithful agent or trustee,

could do no less than acquire possession of the premises, by terminating a worthless, barren lease.

And of this the plaintiff, Kutter, had no reason to complain, for he bought subject to this lease, and all its liabilities; and if Sherman did not protect the estate which he had conveyed to him, he should have done it himself, or suffer the consequences of his own neglect.

The case shows plainly enough, that Kutter, by his agent, E. S. Smith, sought to get rid of a burdensome lease; but when that lease was forfeited for his own, or Sherman's default, he demands in this suit the same privilege and benefit of an appraisement of the building standing on the demised premises, as if he had kept and performed all the covenants resting on him and his assigns; and that, too, seven years before the time fixed in the lease for such appraisement.

The plaintiff cannot maintain this action, for the following reasons:

1. It is prematurely brought. By the terms of the lease an appraisement cannot be had until ten years from May 1, 1859, and in case of future extensions of the lease, similar appraisements are to be made each and every ten years from May 1, 1869. (Record, bottom of page 12, top of page 13.)

2. The appraisement is to be on the value of the buildings "at that time"—May 1, 1869—and not at any prior time. (Record, page 12, bottom.)

3. The buildings are to be appraised and the value paid to the lessee at that time, only on the election of the lessor to do that instead of renewing the lease; and the lessor is to give sixty days notice of his election to purchase said buildings; and the declaration does not show that he has made that election (as indeed he could not, for the time has not come for him to do it). (Record, pages 12 & 13.)

4. The lessor is bound only to pay for the value of the buildings then (May 1, 1869) on the premises, and their value at that *time*, and not at the end of the *term*, as contended by the plaintiff in error. (Record, page 12.)

Van Rensaeller's heirs vs. *Penniman*, 6 Wendell, 581–2.

5. The covenant to appraise and pay for the buildings on the premises, on the first day of May, 1869, is a personal one between Link and Sherman only, and not between them and their assigns. It is not a covenant that runs with the land, and Kutter has no such legal interest in it as will support an action for a breach of it. It does not relate to buildings that were on the land at the time of the demise, but to those which might be put on afterwards; and the building in question was erected after the lease was made, or nearly all of it. (Testimony of Sherman, pages 25 & 26.)

The parties evidently had in view buildings to be erected after the making of the lease, as appears from the first clause of the last section of the lease, giving the lessee the privilege of extending the east wall of the buildings six inches on the adjoining lot, which could only have reference to the wall of a building to be afterwards built. (Record, page 13.)

This brings the case within the first rule established in *Spencer's case*, 3 Coke, 16, Smith's Leading Cases, 75, top, which is as follows:

"1. When the covenant extends to a thing in esse, parcel of "the demise, the thing to be done by force of the covenant "is *quodammodo* annexed and appurtenant to the thing de- "mised, and shall go with the land, and shall bind the as- "signee although he be not bound by express words: but "when the covenant extends to a thing which is not in being "at the time of the demise made, it cannot be appurtenant or

" annexed to the thing which hath no being: as if the lessee " covenants to repair the houses demised to him during the " term, that is parcel of the contract, and extends to the sup- " port of the thing demised, and therefore is *quodammodo* an- " nexed appurtenant to the houses, and shall bind the assignee " although he be not bound expressly by the covenant: but in " the case at bar, the covenant concerns a thing which was " not in esse at the time of the demise made, but to be newly " built after, and therefore shall bind the covenantor, his ex- " ecutors, or administrators, and not the assigee, for the law " will not annex the covenant to a thing which hath no being."

The assignees of the lessor and lessee in this case, take no benefit or burden under this clause in the lease, because they are not named by express words.

Spencer's case, in Smith's Lead'g Cases, 76, top:

" 2. It was resolved that in this case, if the lessee had cov- " enanted for him *and his assigns*, that they would make a " new wall upon some part of the thing demised, that foras- " much as it is to be done upon the land demised, that it should " bind the assignee; for although the covenant doth extend to " a thing to be newly made, yet it is to be made upon the " thing demised, and the assignee is to take the benefit of it, " and therefore shall bind the assignee *by express words.*"

Thompson vs. *Rose*, 8 Cowen, 266.

6. Sherman's estate was a term for years, liable to be determined for his default in paying the rent, or keeping any other covenant on his part to be performed. (Record, pages 11 & 12.)

Kutter had no greater or different rights as assignee of Sherman. The lease was forfeited for Sherman's default in paying the rent; and thereby he and his assignee forfeited all claim to any improvements either of them had put upon the premises.

"If an estate for years determines by the voluntary act "of the tenant himself, as if he commits a forfeiture, he "will not be entitled to emblements" and improvements are not more favored.

1 Greenl. Cruise, 254, top, and notes;
Taylor's Landlord and Tenant, 356, sec. 535;
1 Washburn's Real Prop., 103, sec. 9;
Whittaker vs. *Barker*, 1 Crompton & Meeson, 112 (Philadelphia edition);
Coffin vs. *Talman*, 4 Selden, 465;
Pike vs. *Butler et al.*, 4 Comstock, 360;
Davis et al. vs. *Eyton*, 20 Eng. Com. Law., 83;
Debow vs. *Colfax et al.*, 5 Halsted, 128.

These authorities fully support the instructions to the jury given by the court below, and those asked by the plaintiff in error were correctly refused.

There is no error in the record, and the judgment should be affirmed.

SAM. W. FULLER,

Chicago, February 5th, 1864.